(25,544)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 714.

THE CHICAGO AND ALTON RAILROAD COMPANY AND LOUISIANA & MISSOURI RIVER RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

WILLIAM J. McWHIRT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 10, 1916.

a In the Supreme Court of the United States.

THE CHICAGO & ALTON RAILROAD COMPANY and LOUISIANA & MISSOURI RIVER RAILROAD COMPANY, Plaintiffs in Error,
vs.
WILLIAM J. McWHIRT, Defendant in Error.

Præcipe Upon Writ of Error.

To the Clerk of the Supreme Court of Missouri:

You will please prepare in the above entitled cause a transcript of the record for Plaintiffs in Error to be sent to the Supreme Court of the United States, which transcript shall include the following:

1. The Writ of error.
2. The citation upon the said writ and the return or acknowledgment of service thereof.
3. The supersedeas bond of the plaintiffs in error.
4. The Assignments of Error filed in this court in application for the writ of error.
5. The judgment and opinion of the Supreme Court of Missouri in this cause.
6. The motions for rehearing and to transfer to the court in banc, together with the action of the court thereon.
7. The certified copy of the judgment and order allowing the appeal of defendants (plaintiffs in error) from the circuit court to the Supreme Court of Missouri.
8. Pages 1 to 18, inclusive, and the upper half of page 19
b of Appellants' printed Abstract of the Record in this cause in the Supreme Court of Missouri, which includes the record of the filing of the suit, plaintiff's petition, the petition of The Chicago & Alton Railroad Company for removal to the United States Court, the bill of exceptions upon the denial of same, the answer of The Chicago & Alton Railroad Company, the answer of the Louisiana & Missouri River Railroad Company, and the record entries in the court below.
9. Also please include the following from the printed abstract of the record herein:

Page 29, except the first question and answer thereon, Pages 30, 31 and 32 and first paragraph on page 33. The admission found on the lower half of page 200, and page 201, and the demurrers to the plaintiff's evidence and the action of the court thereon on page 201.

The following words on page 309, "Whereupon at the request of the plaintiff the court gave to the jury the following instructions."

Pages 313 and 314, plaintiff's instruction No. 6.

The lower half of page 321 beginning, "defendants and each of them."

The first and the second paragraphs on page 322, ending, "protection of the law."

Last two paragraphs at the bottom of page 323.

Pages 324 to 335, inclusive, which includes the verdict of the jury, the motions for new trial and in arrest and the action of the court thereon, the affidavit for appeal, the signing of the bill of exceptions and a stipulation.

SCARRITT, SCARRITT, JONES & MILLER,
Attorneys for Plaintiffs in Error.

We hereby acknowledge service and receipt of the above præcipe this 16th day of August, 1916.

J. S. GATSON &
E. S. GAULT,
Attorneys for Defendant in Error Wm. I. McWhirt.

c In the Supreme Court of Missouri.

And thereafter, to-wit, on July 18th, 1916, the following further proceedings were had and entered of record in said cause:

"THE CHICAGO & ALTON RAILROAD COMPANY and LOUISIANA & MISSOURI RIVER RAILROAD COMPANY, Plaintiffs in Error.
vs.
WILLIAM J. MCWHIRT, Defendant in Error.

Now at this day there are presented by The Chicago & Alton Railroad Company, and Louisiana & Missouri River Railroad Company, Plaintiffs in Error, to the Honorable A. M. Woodson, Chief Justice of the Supreme Court of Missouri, in Chambers, a petition for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of Missouri, a writ of error from the Supreme Court of the United States to the Supreme Court of Missouri, an assignment of error, a supersedeas bond in the sum of $20,000.00 and a citation directed to the said Defendant in Error, citing and admonishing it to be and appear in the Supreme Court of the United States, at Washington, within thirty days from the date thereof, which said writ of error is allowed, said assignment of errors filed, said bond, to operate as a supersedeas, approved and ordered filed and citation signed and issued."

1 In the Supreme Court of Missouri, April Term, 1916.

No. 17000.

WILLIAM J. McWHIRT, Respondent,
vs.
THE CHICAGO & ALTON RAILROAD COMPANY and LOUISIANA & MISSOURI RIVER RAILROAD COMPANY, Plaintiffs in Error.

Petition for Writ of Error to Supreme Court of United States.

Now come The Chicago & Alton Railroad Company and Louisiana & Missouri River Railroad Company, plaintiffs in error, and show to the court that this suit was instituted in the Circuit Court of Audrain County, Missouri, on December 15, 1910, and was thereafter sent, upon a change of venue, to the Circuit Court of Ralls County, Missouri; by his petition herein plaintiff McWhirt seeks to recover damages in the sum of Twenty-five Thousand Dollars for personal injuries alleged to have been received by him on May 11, 1910, through being struck by a train and cars then being operated by defendant The Chicago & Alton Railroad Company, its agents and servants; the petition alleges that the defendant The Chicago & Alton Railroad Company was managing and operating the railroad on which and the train by which plaintiff was injured; plaintiff also alleges in his petition that the defendant Louisiana & Mis-
2 souri River Railroad Company is a corporation of Missouri and is the owner of said railroad and that it was permitting its co-defendant, The Chicago & Alton Railroad Company, to operate the said railroad under a lease, license or running arrangement between said companies, and plaintiff seeks to hold defendant Louisiana & Missouri River Railroad Company liable in this case solely as such lessor company under and by virtue of Section 3078, R. S. Missouri 1909.

Defendant, The Chicago & Alton Railroad Company, in due time filed in the Circuit Court of Audrain County its petition and bond for the removal of this cause to the United States Circuit Court for the Eastern District of Missouri, which bond was approved by the Judge of said Circuit Court, but said court refused to allow or recognize said petition for removal, but notwithstanding the same continued to assert jurisdiction of said cause and ordered same to proceed in the state court to trial, to which action of said court said defendant duly excepted and saved its exception.

In said petition for removal to the Federal Court it was set forth that plaintiff sought to hold defendant Louisiana & Missouri River Railroad Company liable only as lessor company, as above stated, and that by reason of said defendant's charter it had procured and had the right to lease its road to The Chicago & Alton Railroad Company upon such terms as it saw fit, and that it had leased its road to said The Chicago & Alton Railroad Company on the condition and terms that said The Chicago & Alton Railroad Company

should solely be liable for its acts in the operation of the said road, and that therefore plaintiff stated no cause of action whatsoever against the defendant Louisiana & Missouri River Railroad Company, and it was further set forth in the petition for removal that even if the Louisiana & Missouri River Railroad Company
3 was liable to plaintiff under his petition still there was a separate and a separable controversy between plaintiff and said The Chicago & Alton Railroad Company and that said defendant and plaintiff were citizens of different states, plaintiff being a citizen and resident of the State of Missouri, Eastern District and said defendant, The Chicago & Alton Railroad Company, being a corporation and citizen of the State of Illinois, and that defendant, Louisiana & Missouri River Railroad Company, was fraudulently joined as a defendant in this cause solely for the purpose of defeating removal to the United States Court.

After the said petition for removal was denied, defendant, The Chicago & Alton Railroad Company, filed herein its answer, duly asserting, among other things, that the state court of Missouri was without jurisdiction of this cause by reason of the same having been duly removed to the United States Circuit Court, and that the Louisiana & Missouri River Railroad Company had been fraudulently and illegally joined as a defendant in this cause; and the Louisiana & Missouri River Railroad Company filed its answer, asserting, among other things, that under and by virtue of its charter from the State of Missouri as set forth in the Act of the Missouri Legislature of January 19, 1870 (Laws of Missouri 1870, p. 3), said defendant was not liable to plaintiff in this cause, and that plaintiff stated no cause of action against it, and that to hold said defendant liable as lessor company under said Section 3078, R. S. Missouri 1909 would impair the obligations of said defendant's contract with the State of Missouri, and with The Chicago & Alton Railroad Company, contrary to and in violation of Section 10, of Article 2 of the Constitution of the United States, and would deprive said defendant of its property without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitu-
4 tion of the United States; and said defendant also asserted in its answer that the state court was without jurisdiction to proceed in said cause because the same had been duly removed by defendant, The Chicago & Alton Railroad Company, to the United States Circuit Court.

Plaintiffs in error further show to the court that all of their said rights and claims under the Constitution and laws of the United States were denied to and decided against the said defendants by the said trial court of the State of Missouri, and jurisdiction was asserted over said cause and trial ordered to proceed with the result that a verdict and judgment were rendered against both defendants in the Circuit Court of Ralls County, Missouri in the sum of Ten Thousand Dollars; that after duly but unsuccessfully moving for a new trial and in arrest of judgment both defendants duly perfected their appeal to the Supreme Court of Missouri, and that in Division No. 1 of the said Supreme Court all of the questions and

rights of the defendants arising under the Constitution and laws of the United States as aforesaid were again claimed and asserted but all were denied to and decided against both defendants, and particularly the claim that said Section 3078, R. S. Missouri 1909 was repugnant to Section 10 of Article 2, and to Section 1 of the Fourteenth Amendment to the United States Constitution, the decision of the said Supreme Court of Missouri, being the highest court of the state, being against the claim of plaintiffs in error and in favor of the validity of said section.

Plaintiffs in error further show to the court that at the April 1916 Term of this court this cause and the judgment herein were affirmed as to both defendants by Division No. 1 of the Supreme Court of Missouri; that thereafter in due time the defendants filed herein their joint motion for rehearing and also their motion
5 to transfer the cause to the Supreme Court of Missouri in banc as provided in Section 4 of Article 6 of the Constitution of Missouri, Amendment of 1890, but that both of said motions were overruled and denied to defendants.

Plaintiffs in error show to the court that throughout this case there was drawn in question a right and privilege claimed under the Constitution and Statutes of the United States with reference to the removal of causes from the State to the Federal Court, and that the decision of this court was against said rights and privileges and that throughout this cause there was drawn in question the validity of Section 3078, R. S. Missouri 1909 on the ground of its being repugnant to the Constitution of the United States, and particularly Section 10 of Article 2, and Section 1 of the Fourteenth Amendment thereof, and that the decision of this court is against plaintiffs in error and in favor of the validity of said Section.

Wherefore, your petitioners pray that a writ of error may issue and that it may be allowed to bring up for review before the Supreme Court of the United States the said order and judgment of the Supreme Court of Missouri in this cause, assignments of error being exhibited herewith.

SCARRITT, SCARRITT, JONES & MILLER,
Attorneys for The Chicago & Alton Railroad Company and Louisiana & Missouri River Railroad Company, Plaintiffs in Error.

E. L. SCARRITT,
Of Counsel.

5½ [Endorsed:] No. 17000. William J. McWhirt vs. The Chicago & Alton Railroad Company et al. Petition for Writ of Error to Supreme Court of United States. Filed Jul- 18, 1916. J. D. Allen, Clerk. Scarritt, Scarritt, Jones & Miller, Attorneys at Law, Scarritt Bldg., Kansas City, Mo.

6 THE CHICAGO & ALTON RAILROAD COMPANY and LOUISIANA & MISSOURI RIVER RAILROAD COMPANY, Plaintiffs in Error,

vs.

WILLIAM J. McWHIRT, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Missouri, Greetings:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, at the April Term 1916 thereof, between William J. McWhirt, Respondent, and The Chicago & Alton Railroad Company and Louisiana & Missouri River Railroad Company, appellants, a manifest error has happened to the great damage of said Appellants, as by their complaint appears,

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ,
7 so that you have the same at Washington, D. C., not exceeding thirty days from and after the date of the citation in this cause, in the said Supreme Court to be then and there held that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct said error what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 14th day of July, in the year of our Lord, One Thusand Nine Hundred and Sixteen.

Issued at the office, in the City of Kansas City, with the seal of the District Court of the United States for the Western District of Missouri, Western Division, dated as aforesaid.

[Seal of the United States District Court of Missouri, Western Division, Western District.]

JOHN B. WARNER,
Clerk of the District Court of the United States for the Western District of Missouri, Western Division,
By C. J. MURRAY, D. C.

Allowed by
A. M. WOODSON,
Chief Justice Supreme Court of Missouri.

7½ [Endorsed:] No. —. The Chicago & Alton Railroad Company et al. vs. William J. McWhirt. Writ of Error. Filed Jul- 18, 1916. J. D. Allen, Clerk. Scarritt, Scarritt, Jones & Miller, Attorneys at Law, Scarritt Bldg., Kansas City, Mo.

8 *Citation.*

In the Supreme Court of the United States.

THE CHICAGO & ALTON RAILROAD COMPANY and Louisiana & MISSOURI RIVER RAILROAD COMPANY, Plaintiffs in Error,
vs.
WILLIAM J. MCWHIRT, Defendant in Error.

The United States of America to William J. McWhirt, Greetings:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washington, D. C., not exceeding thirty days from and after the day this citation bears date, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of Missouri, wherein The Chicago & Alton Railroad Company and Louisiana & Missouri River Railroad Company are plaintiffs in error and you are defendant in error, to show cause, if any there by, why the judgment rendered against said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Archelaus M. Woodson, Chief Justice of the Supreme Court of Missouri, this 19th day of July, in the year of our Lord, One Thousand Nine Hundred and Sixteen.

A. M. WOODSON,
Chief Justice Supreme Court of Missouri.

8a UNITED STATES OF AMERICA,
Supreme Court of Missouri, ss:

We hereby acknowledge due service of the within citation this 26 day of July, A. D. 1916.

JNO. S. GATSON,
Attorneys for Defendant in Error.

8½ [Endorsed:] No. 17000. The Chicago & Alton Railroad Company et al. vs. William J. McWhirt. Citation. Filed Jul- 18, 1916. J. D. Allen, Clerk. Scarritt, Scarritt, Jones & Miller, Attorneys at Law, Scarritt Bldg., Kansas City, Mo.

9 A copy of which said bond is as follows:

In the Supreme Court of the United States.

THE CHICAGO & ALTON RAILROAD COMPANY and LOUISIANA & MISSOURI RIVER RAILROAD COMPANY, Plaintiffs in Error,
vs.
WILLIAM J. McWHIRT, Defendant in Error.

Bond.

Know all men by these presents, that we, The Chicago & Alton Railroad Company, a corporation, and Louisiana & Missouri River Railroad Company, a corporation, as principals, and Chicago Bonding and Surety Company, as surety, are held and firmly bound unto William J. McWhirt, and his assigns, in the sum of Twenty Thousand Dollars, to be paid to said obligee, his successors, representatives and assigns, for the payment of which well and truly to be made we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 13th day of July A. D. 1916.

Whereas, the above named, The Chicago & Alton Railroad Company and Louisiana & Missouri River Railroad Company, the plaintiffs in error, have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment heretofore rendered in the above entitled cause by the Supreme Court of the State of Missouri.

Now, therefore, the condition of this obligation is such that if the above named plaintiffs in error shall prosecute their said writ of error to effect and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

THE CHICAGO & ALTON RAILROAD COMPANY,
By SCARRITT, SCARRITT, JONES & MILLER,
Its Attorneys.
LOUISIANA & MISSOURI RIVER RAILROAD CO.,
By SCARRITT, SCARRITT, JONES & MILLER,
Its Attorneys.
CHICAGO BOND & SURETY COMPANY,
W. L. GRAHAM, *Attorney in Fact.* [SEAL.]

10 I hereby approve the foregoing bond and surety this 9th day of July, 1916.

A. M. WOODSON,
Chief Justice Supreme Court of the State of Missouri.

11 In the Supreme Court of Missouri, April Term, 1916.

No. 17000.

WILLIAM J. McWHIRT, Plaintiff and Respondent,

vs.

THE CHICAGO & ALTON RAILROAD COMPANY and LOUISIANA & Missouri River Railroad Company, Defendants and Appellants.

Assignment of Errors.

Now come the above named defendants and appellants and file the following assignment of errors upon which they will rely in their prosecution of their writ of error upon the records, proceedings and judgment in the above entitled cause:

I.

The Supreme Court of Missouri erred in holding, determining and adjudging the statute and law of the State of Missouri known as Section 3078, Chapter 33, of the Revised Statutes of Missouri of 1909, Vol. 1, page 1105, being section 2 of a public law of Missouri entitled, "An act to amend chapter 63 of the general statutes entitled of railroad companies, so as to authorize the consolidation, leasing and extension of railroads," approved March 24, 1870 (Laws of Missouri 1870, pp. 89, 91), valid and constitutional and determinative of the liability of this defendant, against the claim of defendant Louisiana & Missouri River Railroad Company that the said statute and law, and especially that portion thereof which
12 prescribes that a corporation in this state leasing its road to a corporation of another state shall remain liable as if it operated the road itself, without regard to the time such a corporation was incorporated or the nature of its charter rights, is unconstitutional and void, as being repugnant to the fourteenth amendment of the Constitution of the United States and that portion thereof which declares that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, and especially is the said statute and law unconstitutional and void on the grounds aforesaid as to this defendant which was incorporated under and which exercised its franchise granted by a public law of Missouri entitled, 'An act to amend an act entitled an act to amend an act to incorporate the Louisiana & Missouri River Railroad Company, approved March 24th, 1868, and to consolidate the various acts relating to said company," approved January 19th, 1870 (Laws of Missouri 1870, pp. 93, 103), and which had the right under its said corporate franchise and the said public act to lease its said railroad without thereby assuming all or any liability for damage occasioned by the negligence of the lessee such as is claimed in this suit.

II.

The Supreme Court of Missouri erred in holding, determining and adjudging the statute and law of the State of Missouri known as Section 3078, Chapter 33, Article 2 of the Revised Statutes of Missouri of 1901, Vol. 1, page 1105, being section 2 of a public law of Missouri entitled, "An act to amend chapter 63 of the general statutes entitled of railroad companies, so as to authorize the consolidation, leasing and extension of railroads," approved March 24th, 1870 (Laws of Missouri 1870, pp. 89, 91), valid and con-
13 stitutional and determinative of the liability of defendant Louisiana & Missouri River Railroad Company against the claim of this defendant that the said statute and law, and especially that portion thereof which prescribes that a corporation in this state leasing its road to a corporation of another state shall remain liable as if it operated the road itself, without regard to the time such a corporation was incorporated or the nature of its charter rights, is unconstitutional and void, as being repugnant to Section 10, Article II of the Constitution of the United States and that part thereof which provides that "no State shall * * * pass any bill of attainder, ex post facto law or law impairing the obligations of contracts or grant any title of nobility," and especially is the said statute and law unconstitutional and void on the grounds aforesaid as to this defendant which was incorporated under and which exercised its franchise granted by a public law of Missouri entitled, An act to amend an act entitled an act to amend an act to incorporate the Louisiana & Missouri River Railroad Company, approved March 24th, 1868, and to consolidate the various acts relating to said company," approved January 19th, 1870 (Laws of Missouri 1870, p. 93, 103), and which had the right under its said corporate franchise and the said public act to lease its said railroad without thereby assuming all or any liability for damage occasioned by the negligence of the lessee such as is claimed in this suit.

III.

The Supreme Court of Missouri erred in not adjudging valid an instruction to the jury tendered by the defendant Louisiana & Missouri River Railroad Company at the conclusion of the evidence at the trial of said cause in the nature of a demurrer thereto,
14 and in not reversing the judgment of the trial court in this cause for its refusal to grant said instruction in the nature of a demurrer to the evidence, for the reason that as to this defendant, which was incorporated and exercised charter powers under a public law of Missouri entitled, "An act to amend an act entitled An act to amend an act to incorporate the Louisiana & Missouri River Railroad Company, approved March 24th, 1868, and to consolidate the various acts relating to said company, approved January 19th, 1870 (Laws of Missouri 1870 pp. 93, 103), which granted it the right to lease its said railroad without imposing a liability thereon for the negligent acts of the lessee (sec. 43 of said

act Laws of Missouri, p. 103), and which rights were vested in this defendant prior to the enactment of said section 3078, Revised Statutes of Missouri of 1909, the said section 3078 Revised Statutes of Missouri of 1909, and especially that part thereof which purports to impose upon any corporation, and especially this defendant, thereafter leasing its railroad in the State of Missouri the obligation to remain liable for all of the acts of the lessee as if it operated the railroad is unconstitutional and void, for that it deprives the defendant of its property right in its said franchise without due process of law, contrary to the guaranty in that respect of the fourteenth amendment of the Constitution of the United States, and is repugnant to section 10, article II of the Constitution of the United States and that provision thereof which provides that no state shall pass any ex post facto law or law impairing the obligations of contracts.

IV.

The Supreme Court of Missouri erred in not sustaining the allegations of the motion of defendant Louisiana & Missouri River
15 Railroad Company for a new trial filed in this cause, and particularly paragraph numbered 20, which alleged error in the trial court in refusing proper instructions asked by the defendant, and because the law of Missouri, section 3078 of the Revised Statutes of Missouri of 1909, under which the action is brought, is unconstitutional and void in that it violates the Constitution of the United States, Section 10, Article 2, which provides that no state shall pas- any law that impairs the obligation of contracts, and the fourteenth amendment thereof; and in that the said Supreme Court did not reverse the judgment of the circuit court of Ralls County, Missouri in said cause for not sustaining the said defendant's motion for a new trial and the said allegations thereof contained in said paragraph 20 thereof for the reasons aforesaid.

V.

The Supreme Court of Missouri erred in not sustaining the appellants' motion for a rehearing and their motion to transfer the cause to the court in banc, and in denying defendants' claims in each of the said motions contained that the law of Missouri, section 3078 of the Revised Statutes of 1909 is unconstitutional and void in that it denies the defendants the equal protection of the law and that thereby the State of Missouri has deprived the defendants of their property without due process of law, contrary to the provisions of the fourteenth amendment of the Constitution of the United States in that respect.

VI.

Upon the record in this court it appears that the law of Missouri, section 3078, Revised Statutes of 1909, is unconstitutional
16 and void, for that it is repugnant to the provisions of the Constitution of the United States hereinbefore particularly

referred to, and that the validity and constitutionality of that law is determinative of the plaintiff's right to recover against the defendants in this cause; that the decision of the Supreme Court of Missouri, the highest court of the state, in this cause is in favor of the validity of the said statute, and that the said court erred in denying the contention of defendants to the contrary and in holding that the said law is valid, and erred in rendering and entering a judgment in this cause in favor of the plaintiff, and in not rendering and entering a judgment in this cause in favor of the defendants.

VII.

The Supreme Court of Missouri erred in denying the claim of defendants and in refusing to hold that the state courts of Missouri were without jurisdiction to try this cause and to render judgment therein, because defendant The Chicago & Alton Railroad Company had duly and in due time filed herein its petition and bond for the removal of this cause to the United States Circuit Court, said bond being in due form and approved as sufficient by the state trial court, and said petition for removal setting forth that plaintiff is a citizen of the state of Missouri, Eastern District, and that the defendant The Chicago & Alton Railroad Company is a citizen of the State of Illinois, and that plaintiff neither had nor stated a cause of action against the other defendant Louisiana & Missouri River Railroad Company, and that the issue in the case was solely between plaintiff and defendant The Chicago & Alton Railroad Company,
17 and that the Louisiana & Missouri River Railroad Company was fraudulently joined as a party defendant solely to prevent the removal of this cause to the United States Court; and further that if plaintiff stated any cause of action against defendant Louisiana & Missouri River Railroad Company there was still a separate and separable controversy between plaintiff, a citizen of Missouri, and defendant, The Chicago & Alton Railroad Company, a citizen of Illinois, the amount in controversy being more than $3,000. The state trial court and the state Supreme Court, being the highest court of the state, denied and ignored said petition for removal and still assumed jurisdiction of this cause and compelled said defendant The Chicago & Alton Railroad Company to try this cause and to have judgment against it in the sum of $10,000; thereby drawing in question the validity of a statute of or authority under the United States with reference to the removal of causes from the state courts, the decision being against the validity thereof, and thereby deciding against and denying to said defendant The Chicago & Alton Railroad Company a right and privilege specially set up and claimed under the Constitution and Statutes of the United States, with reference to the removal of causes from state courts.

VIII.

The Supreme Court of Missouri erred in denying defendant The Chicago & Alton Railroad Company's claim set up in its answer

herein and in said defendant's motion for a new trial in the Circuit Court, paragraph 18, and in its Assignment of Errors, paragraph 8, in the Supreme Court, to the effect that the state trial court was without jurisdiction of this cause as to said defendant by reason of
the fact that this cause had been duly and properly removed
18 by said defendant to the Circuit Court of the United States;
thereby denying to said defendant a right and privilege under the Constitution and Statutes of the United States, specially set up and asserted throughout the case by said defendant; the decision of the Supreme Court of Missouri being against such right and privilege.

IX.

The Supreme Court of Missouri erred in refusing to uphold the claim of defendants that this cause had been duly and properly removed to the Circuit Court of the United States, and that the state trial court was without jurisdiction in this cause.

Wherefore, the said defendants and appellants pray that the judgment of the Supreme Court of Missouri be reversed and that the said court be directed to reverse its said judgment and dismiss said cause.

WILLIAM C. SCARRITT,
ELLIOTT H. JONES,
CHARLES M. MILLER,
Attorneys for Appellants (Plaintiffs in Error).

E. L. SCARRITT,
Of Counsel.

18½ [Endorsed:] No. 17,000. William J. McWhirt vs. The Chicago & Alton Railroad Company et al. Assignment of Errors. Filed Jul- 18, 1916. J. D. Allen, Clerk. Scarritt, Scarritt, Jones & Miller, Attorneys at Law, Scarritt B'ld'g, Kansas City, Mo.

19 In the Supreme Court of Missouri, Division No. 1, April Term, 1916.

And thereafter, to-wit, on June 2nd, 1916, the following further proceedings were had and entered of record in said cause:

"WILLIAM J. MCWHIRT, Respondent,
vs.
THE CHICAGO & ALTON RAILROAD COMPANY and LOUISIANA & MISSOURI RIVER RAILROAD COMPANY, Appellants.

Appeal from the Circuit Court of Ralls County.

Now at this day, come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised

of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Ralls County rendered, by in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellant, his costs and charges herein expended and have therefor execution. (Opinion filed.)

Which said opinion is in words and figures as follows:

20 In the Supreme Court of Missouri, Division No. 1, April Term, 1916.

No. 17,000.

WILLIAM J. McWHIRT, Respondent,
vs.
THE CHICAGO & ALTON RAILROAD COMPANY and LOUISIANA & MISSOURI RIVER RAILROAD COMPANY, Appellants.

Appeal from the Circuit Court for Ralls County.

This is a suit for personal injury alleged to have been received from the negligent operation of the engine and cars of the defendant Chicago and Alton Railroad Company, an Illinois corporation operating a railroad through the city of Vandalia in this state as the lessee of the Louisiana & Missouri River Railroad Company, a Missouri corporation which is sued by reason of its alleged liability as lessor. The petition alleges, in substance, that the accident occurred while the plaintiff was crossing the tracks of defendants upon a public road or street in that city called D Street, where "he was struck by cars, engine and tender" being backed west on defendants' tracks, across the street. The particular allegations of negligence upon which the plaintiff depends are (1) that the crossing is at all times extensively used by persons on foot and in vehicles and it was the duty of defendants to have their locomotives and cars under full control and a light on the front of cars being moved at night at that place and some person in advance and on the front end of such cars moving over said crossing in order to give travelers crossing the track
21 the necessary warning of the approach of such cars, but that defendants and their agents and servants in violation of their duty carelessly ran a train of cars and locomotive backwards up to and over said crossing and negligently and carelessly failed to keep a lookout for persons thereon. (2) That the defendants did not, within eighty rods, or within any other distance of said crossing, ring the bell or blow the whistle on said cars and locomotive, and keep the same ringing and blowing until the engine had passed the crossing but negligently and carelessly and unlawfully failed to give any signal at all of the approach of said train at said crossing, but negligently ran the said cars against said plaintiff. (3) That the defendants carelessly and negligently backed said cars, engine and tender upon and across said street without having any one in charge thereof and without having anyone in advance of said cars to indi-

cate their approach and without having any one at the front end of said cars to keep a lookout for pedestrians, who were, as defendants knew, in the habit of crossing the tracks at that point frequently at all hours of the day and night.

D Street is the principal business street of the city of Vandalia and is sometimes called Main street. It is crossed at right angles by the three tracks of the railroad which run approximately east and west through the city. The main track is on the north side, then comes the passing track and business track in that order. The freight and passenger station is west of D Street on the north side of the main track. The passing track connects with the main track by switch, about six hundred feet east of D Street. The business track leaves the passing track about a hundred feet west of the eastern connection of the latter. These tracks are parallel, and so close together that the three occupy a space of only thirty-one feet. The business houses fronting on the east side of D Street extend to within twenty-one feet of the business track on the south while those
22 north of the railroad begin about forty-three feet from the north rail of the main track, leaving a right of way of about ninety-five feet exclusively occupied by the railroad company.

At between eight and nine o'clock in the evening of the day of the accident (May 11, 1910) train No. 130, a freight train, going east came into Vandalia and stopped at the depot, where it had orders to pick up two cars standing on the business track west of D Street. Counting from the east, these were the fourth and fifth cars in a string standing coupled together. The engine was cut off with its tender and, with the head brakeman, went to get these cars. Proceeding east to the switch, which with the switch to the business track, was lined by the brakeman, it backed west on the business track across D Street, brought out the five cars, put the two west ones onto the main track, and went back with the other three to set them on the business track west of D Street, where he had found them. When the front car came to the sidewalk on the east side of D Street the plaintiff, who was going north on that walk had just stepped upon the track, and was struck by it and seriously injured. These movements will be more fully described in the opinion.

D Street is 64.6 feet wide. Near its west line and about ten feet north of the main track was an electric bell which one of defendants' brakemen testified was set so that when the switches were lined for the passing and business tracks it would ring and that it was ringing at the time of the accident. Plaintiff's evidence tended to prove that it was not.

Several of plaintiff's witnesses testified without objection on the part of defendants that before the accident a car or cars stood upon the business track just east of the east line of D Street and some of them testified, also without objection, that they were in a building near by and heard a crash as if cars were coupling, and soon afterwards heard cries, and ascertained that the accident had
23 occurred.

At the close of plaintiff's evidence defendants moved for an instruction in the nature of a demurrer to the evidence which was refused. At this point in the trial the defendants filed an affidavit

of surprise, and for a continuance, the nature of which is sufficiently shown by the following colloquy between the attorneys at the time.

"Mr. Jones: I would like a few minutes to prepare an affidavit of surprise. This evidence about any cars standing on the track comes as an absolute surprise to us because nothing intimated that in the petition, and there was at the last trial not even a suggestion of any cars standing upon that track——

"Mr. Gantt: I will state to the court, Mr. Jones says, 'That came as a surprise to him, this evidence.' I really think I was the one that was surprised. I did not know about it at the time of the trial——

"Mr. Jones: You admit when you wrote the petition you did not know about that?

"Mr. Gantt: Yes sir, I did not know that there were any cars standing there."

Affidavits and application for a continuance was then filed and overruled by the court, and exception saved.

The defendants then introduced their evidence after which they renewed their request for peremptory instructions which were again refused.

When the evidence was all in plaintiff abandoned all the charges of negligence contained in the petition except the failure to give statutory or other sufficient signals as the cars approached and entered upon the street crossing, and at his instance the jury were especially instructed that if the agents and servants of the Railroad Company in charge of the train and cars should elect to give
24 other signals and warnings instead of either ringing the bell or sounding the whistle they might do so and omit the statutory signals, provided such other signals were sufficient to give notice to a careful and observant person on or near the crossing, that a train of cars was approaching it; and that there was no evidence of any other acts of negligence charged in the petition.

It instructed, at defendants instance, and in many forms upon the subject of contributory negligence but refused to instruct that section 3078 of the Revised Statutes 1909 is not applicable to the defendant Louisiana and Missouri River Railroad Company, and that in its application to that company it is unconstitutional and void.

There was a verdict and judgment for ten thousand dollars against both defendants.

1. For the fourth time the defendant corporations are in this court asking us to construe the lease dated August 1, 1870 by which the defendant Louisiana & Missouri River Railroad Company leased this railroad property to the predecessor of its codefendant under the very circumstances out of which this suit has grown, and to declare the act of March 24, 1870, unconstitutional in so far as it attempts to make the lessor liable for the negligence of the lessee. Fleming vs. Railroad, 263 Mo., 180; Brown vs. Railroad, 256 Mo., 522; Markey vs. Railroad, 185 Mo., 348.) Long before the first of these cases came before us the most of the questions involved had necessarily been construed and determined in Smith vs. Pacific

R. R., 61 Mo., 17, (1875), and the last in the category which the ingenuity of appellants has suggested was expressly determined against them in the Fleming case. We are still satisfied with our decision in that case and hold that the Louisiana & Missouri River Company is liable with the Chicago and Alton Railroad Company in cases of this character.

2. Nor are we impressed by the force of the defendants' contention that the court erred in overruling the application for
25 continuance made at the close of plaintiff's evidence, on the ground of surprise by plaintiff's testimony to the effect that before the accident occurred cars were standing upon the track on both sides of the crossing, and that some men in a building nearby heard a noise as of the impact of cars, and cries or calls at the place of the accident, which occurred at that time. The affidavit for continuance showed that the cause had been tried upon the same petition in Audrain county; that it was then tried upon the theory that the plaintiff had been struck by the foremost of a string or drag of cars attached to and being pushed by an engine over the crossing and that no evidence had been introduced in that trial as to plaintiff having been injured by a car which was not at that time attached to any train or other car but was "shunted" by the impact onto the crossing. This theory was not submitted to the jury. If the evidence was not pertinent to the issues made in the petition it should have been objected to, and had it then been admitted the action of the court in so doing could have been assigned as error and reviewed in this appeal. Had the court permitted the petition to be amended to conform to it, the cause for continuance would then have been in the amendment. The cause so far as the record shows was submitted upon the same issues made and submitted in Audrain county. So far as the evidence was pertinent to those issues it was cumulative, and the defendants should have been prepared to meet it. They were not called upon to assume that the second trial would be a mere duplicate of the first, without additional evidence, and its introduction can only be permitted to stop the trial when there is something in its character or the circumstances under which it has been withheld that indicates that the other party has not only been misled, but has been prejudiced. This testimony related simply to the physical conditions existing at the place of the accident, and in view of the facts developed at the trial by both parties, we do not think
26 it affected the real issue. The action of the court in refusing the continuance was harmless and does not constitute reversible error.

3. The defendants seem to object to the petition on the ground of duplicity; that is to say that the facts stated constitute two or more causes of action inconsistent with each other. This objection comes too late after the verdict and the record is silent as to any attempt to make it before. Both defendants answered to the merits and no objection was made on this ground to any proceeding in the trial, nor in either the motions for a new trial or in arrest of judgment. But aside from this we find no duplicity in the petition.

The fact constituting the wrong charged is that the plaintiff "was struck by cars, engine and tender, running west on defendant railway companies' tracks" then and there being backed over and across said D. Street. The negligence charged is in substance that the defendants did this without taking any precaution to warn the plaintiff so that he would know of the coming of the engine and cars in time to save himself from injury, and that they were running at an illegal rate of speed. It does not impair the sweeping character of this statement that it enumerates diverse things which the defendant should have done to warn plaintiff. When reduced to their final analysis it avers that the defendant operating the road ran its engine, tender and cars upon the plaintiff on a public highway crossing at a high rate of speed without any warning whatever. This is the single cause of action stated, of which enough of the elements to constitute a wrongful injury had necessarily to be proven, and these elements consist of all the circumstances which tended to characterize the act as wrongful or innocent, and these were all admissible in evidence. While an injury by a car negligently kicked across the street without warning might of itself constitute a cause of action there was no such complaint in the petition. The position of the cars at the time, and the manner in which they were
27 handled, were the things from which the jury must determine the wrong and consequent liability. For this reason the defendants' instruction directing the jury not to consider the testimony of the witnesses introduced by the plaintiff as to the position of the cars on this track before the accident was properly refused. We will notice its character and effect to some extent in the next paragraph.

4. Although the defendants complain of the refusal of their instructions in the nature of demurrers to the evidence asked at the close of plaintiff's evidence they did not seem willing to stand upon the position so taken, as they had the right to do, but introduced testimony for themselves. We are therefore relieved of the duty of examining the question whether those instructions were well founded, and must consider the entire evidence in determining whether the court should have taken the cars from the jury. The testimony of defendants throws much light upon the subject and tends to illuminate many things which might otherwise have escaped the attention of the plaintiff, who was not in so favorable a position to find them out. The very gist of his complaint is that the defendants wrongfully kept him in ignorance of what they were doing at a time when it was their duty to inform him.

The railway owned the right of way approximately one hundred feet wide through the entire city. Its station was something more than three hundred feet west of the main street upon which this accident occurred, and the entire block in which it was situated, about six hundred feet wide, except the right of way upon which its tracks were situated had been planted with trees and shrubbery by the appellants, and was used as a park. There was no sidewalk on the west side of Main street. All the principal business houses of the town were arranged along its east side, where there was a con-

crete walk and crossing over the tracks. On the east side of the street north of the tracks was an incandescent electric light of sixteen candle power, eight feet from the ground, while in the other
28 side of the street was an electric bell. The light was about twenty-five feet north of the main track, while the bell was about ten feet north of it. The railway yard in which the accident occurred consisted of a main track running on a straight line a little north of east past the station and through the town. Immediately south of it at the usual distance for clearance, and connecting with the main track about six hundred feet east of Main Street, was the passing track, while still further south was the business track on which this accident occurred, having about the same clearance and connecting with the passing track about five hundred feet east of the street.

The freight train came into the station from the west at some time between eight and nine o'clock. The crew consisted of Mr. Wiseman, the conductor, Mr. Stevenson, the engineer, Mr. Reynolds, the head brakeman, and Mr. Edwards, the rear brakeman (who all testified for defendants) and a fireman who did not testify and whose name does not appear. The evening was very dark, wet and misty, so dark in fact that one of the witnesses testified that in coming to town just before the accident on horseback he was compelled to dismount in order to see the approach of a bridge, and led his horse, which was gentle, across it. There was an arc light one block south of the right of way about fourteen feet high hooded with an ordinary reflector, and another similar light a block north of the right of way, both on the east side of the street. These were the only lights in the vicinity.

The testimony of the engineer and trainmen developed the fact that they were to pick up two freight cars at the station which were coupled in a string of cars sitting on the business track, the two being somewhat east of the station. When the train stopped the engine was cut off and went forward on the main track with the head brakeman, who got out, lined the switches into the business track and signaled the engine to come back. The whistle
29 did not answer this signal but the engine came into the business track, and across Main street, and coupled to the string sitting west of the street and down toward the station. The two cars to be taken were the fourth and fifth cars in this string. The conductor had come out of the station and stood at the coupling between the fifth and sixth cars of the string. He released the five cars to be taken out, gave the signal, and what then became of him does not appear. The engine with the five cars then proceeded to the east switch line for the main track, the two cars were released, and kicked into it, the switch relined for the passing track by the head brakeman who signaled the engineer who says he answered it with the back up signal of three short blasts, which was the only sound that either bell or whistle made during the two movements. The engineer says he is sure he gave the back up signal at this time and that he did not give it when he first backed into the switch, but gives no reason. The train then consisted of the engine and tender,

the length of which is not mentioned, running backward, and three cars each forty-two feet long with its couplings, with a clear track to the string from which the cars had been taken. When the front car arrived at the Main street sidewalk it struck the plaintiff. Up to this point there is no controversy about the movements of the engine and cars. Whether a car stood east of the Main street crossing that afternoon is of no consequence, if it did it had simply been taken up in this movement leaving a clear track. Nor is it of any consequence how close to the west line of Main street the string from which this drag was taken was standing that afternoon or evening. It simply has nothing to do with the case, except as a detail of the situation to be taken into consideration by the jury in determining the movements of the various actors and the accuracy of their testimony. Nor is the testimony of the three men who were in a nearby room who heard the crash of the cars and the cries indicating
30 that some sort of accident had happened, of any more importance than the position of these cars. It does not appear that taking up the slack of the coupling devices and their impact would necessarily make a louder and different noise than the sudden impact of the same coupling devices caused by the sudden stoppage of the engine. The defendants are not disputing the statement of the engineer that he approached this crossing from a point at least six hundred feet away without giving any of the signals required by the statute during the movement of his train. That this was gross negligence on the part of those in charge of the movement, unless some other reasonable and adequate warning was given cannot be denied, so that the entire question of the negligence of defendants depends upon whether such warning was given.

The head brakeman in charge of the movement testified that he was riding upon the ladder at the east end of the front car. This would leave forty feet between him and the dangerous end of the car along a dark alley approximately eighteen feet in width, enveloped in darkness into which he could only look through the little circle of light from his own lantern, which he held in his left hand between himself and the crossing. Edwards, the rear brakeman, testified that he was on the west car for the purpose of riding as near as he could to the caboose, which was his place on the train flitting from the top to the north side but not being able to state just where he was at the time of the accident. If he was then on the side of the car he would have to look through it to see the approach of Mr. McWhirt, which he does not claim to have observed. The wavering character of his impressions renders his testimony valueless as a guide to the facts. The evidence for defendants, without the aid from the positive testimony of plaintiff, conclusively shows that there was no lookout at the front end of the car and no one in position to protect or warn people passing along the sidewalk.
Mr. Stevenson voluntarily testified that he knew that Main
31 street was very much travelled and that it was necessary to exercise care in crossing it; while Mr. Reynolds testified that it was his duty to keep watch ahead of the cars for the purpose of protecting people crossing the tracks at that street. Even had not

the plaintiff testified that he approached the track with car, stopping and looking both ways and seeing a lantern west of the crossing which give light enough to disclose some portion of the man who held it and the car, stopped upon the track with the picture in his mind and was immediately struck by the car coming from the other way, carries evidence of its truth, and the accuracy of his observation upon its face. He was a farmer, and the law will not hold him to a perfect knowledge of railroad operation. Its rules are for the protection of all who have rightful occasion to use the public streets. Even those who may not have had an opportunity to observe the practice of railroads are not outlawed in this respect. When he heard the rumbling of the switching in the east and the law did not require him to wait until something had crossed the street, for it might never come. When he looked east he saw nothing. He looked west, and saw the lantern and the man holding it at the very place where Mr. Wiseman had but a few moments before stood with his lantern and released the five cars from the string to which it had been coupled, and it seems reasonable to suppose that he was waiting to signal the engineer when he should approach, either directly or through the head brakeman, to couple the remaining three cars into the same string from which they had been taken. He cannot be blamed for believing that the danger was from that direction and for keeping that light in view when he stepped upon the track. In short the testimony of Mr. McWhirt fits so nicely in the circumstances of the movement as related by Mr. Stevenson as to demand attentive consideration. If it were true, and the jury had the right to believe it a light at the front end of the car would have saved him from harm.

The evidence was convincing of the negligence of de-
32 fendants. The plaintiff testified, and we cannot blame the jury if it believed him, that when he heard the rumbling of cars toward the east he stopped twice and looked and listened to see if there were evidences of their proximaty. He neither saw nor heard any such evidences but did see the light at the end of the string of cars opposite the depot, and took measures to protect himself against the danger it might indicate. We think that if his statement be true, he met all the requirements of the law in his effort to guard himself against the defendants' negligence. We do not take it to be the law that having done all, without success in escaping the pursuing negligence, the victim must be held to have brought the calamity upon his own head. It is suggested also as evidence of contributory negligence that plaintiff had taken two drinks of whisky, and that the bottle containing what he had not consumed or given to his friends was broken in his pocket and communicated its odor to his clothing. Even this unfortunate circumstance ought not to justify the defendants for neglecting their duty to use reasonable care under the circumstances to protect him. A careful reading of the testimony has failed to impress us that his two drinks had any tendency to relax the care which he owed to defendants to protect himself from dangers to which their negligence in the operation of the road might expose him, or that it affected his ability to accurately observe his surroundings. We

think that the question of contributory negligence was well submitted to the jury.

5. The defendants have assigned numerous errors in the admission of testimony relating to visual conditions surrounding the eighteen feet of walk included in the plaintiff's progress from the corner of the mill-nery store to the corner of the car which collided with his head. These errors, if they were errors, were distributed with reasonable equality between the parties, and we do not think this testimony prejudiced or influenced the jury. A situation was before them, which it is true could not well be repro-
33 duced for observation. The darkness, the mist and fog, the little sixteen candle power light fifty feet north, the arc lights a block away to the north and south of the scene—all those things were before the jury in a vivid verbal picture. They could determine from all this unquestioned evidence where the lights or shadows predominated with respect to this particular view, and a part of their equipment for the performance of their own duties no doubt consisted of a recollection of the caprices of eye sight which they themselves had experienced. We do not think that the rulings of the court in this connection were prejudicial error.

6. Finally the defendants contended that the damages are so excessive as to indicate such an improper state of mind on the part of the jury and neglect of duty on the part of the trial court as call for our interference. While the judgment is a substantial one and if one's limbs were to be considered as investments, founded only upon the income which they return, and which would afford a simple measure of damage for their destruction, there would be much justice in this claim, but there are elements which the law takes into consideration in case of such injuries that do not admit of such simplicity of measurement. The pain, and physical and mental suffering are elements more difficult to determine. And there are two elements in every human life that must be reckoned with under such circumstances; (1) the earning capacity which may be measured with more or less accuracy in money; and (2) the physical as well as the mental equipment by which one enjoys the fruits of his activities.

Out of the latter grows mental suffering which the law considers as resulting from physical disability and disfigurement.

Plaintiff's left leg was amputated between the foot and the knee. The right foot was crushed and broken but not permanently disabled and he was injured about the head.

34 Taking all these things into consideration we do not think the judgment in this case is so excessive as to justify our interference with the discretion lodged by law in the trial court. The judgment is therefore affirmed.

Railey, C., concurs.

STEPHEN S. BROWN,
Commissioner.

Per Curiam: The foregoing opinion of Brown, C. is adopted as the opinion of the court. All Concur.

35 In the Supreme Court of Missouri.

And thereafter, to-wit, on June 12th, 1916, the following further proceedings were had and entered of record in said cause:

17000.

"WILLIAM MCWHIRT, Resp.,
vs.
THE CHICAGO & ALTON RY. CO., et al., App.

Come now the said appellants, by attorney, and file their motion for a rehearing herein; and also their motion to transfer this cause to the Court in Banc."

And thereafter, to-wit, on July 3rd, 1916, the following further proceedings were had and entered of record in said cause:

17000.

"WILLIAM MCWHIRT, Resp.,
vs.
THE CHICAGO & ALTON RY. CO., et al., Apps.

Now at this day, the Court having considered and fully understood the motions for rehearing and to transfer this cause to the Court in Banc, heretofore filed herein, doth order that said motions be and the are hereby overruled."

Which said motions are in words and figures as follows;

36 Which said motion for rehearing is in words and figures as follows:

In the Supreme Court of Missouri, Division No. 1, April Term, 1916.

No. 17000.

WILLIAM J. MCWHIRT, Respondent,
vs.
THE CHICAGO & ALTON RAILROAD COMPANY and LOUISIANA AND MISSOURI RIVER RAILROAD COMPANY, Appellants.

Motion for Re-hearing.

Now come appellants and move the court to grant them a rehearing in the above entitled cause for the following reasons, to-wit:

1. The court is in error in declaring that the precise question attempted to be raised and discussed in the case at bar concerning the liability of defendant, the Louisiana & Missouri River Railroad Company, has been heretofore passed upon by this court, and decided

against appellants. We submit that none of the cases heretofore decided involving this general question, has directly passed upon the effect of the fact that the original charter of said company granted in 1859 and also the amended charter of said company granted in 1870 expressly exempted said corporation and its charter from any reserve power in the legislature to amend its charter.

2. The court has apparently misconceived our point with reference to the testimony introduced by plaintiff to the effect that there was a car standing on the track of the accident immediately east of the crossing in question, and that the accident was caused by this standing car being suddenly coupled into. The court discusses and decides the case as if the accident occurred as charged in plaintiff's petition, namely, that plaintiff was struck by a car which was moved to and over this crossing, a constitutive part of the train. The court has overlooked our contention that plaintiff did not introduce one syl-able of testimony tending to support this theory of the case.

37 On the contrary, all of plaintiff's testimony negative this theory, and tend to show that the car that struck plaintiff was not moved toward the crossing as a constitutive part of a train, as directly charged in the petition, but that the car was standing still, immediately at the crossing, and that the accident occurred by reason of this car being suddenly coupled into. The court has therefore failed to pass upon the proposition that we chiefly urge, namely, that there was a variance between plaintiff's petition and all of plaintiff's evidence.

3. The court erred in ruling that the admission of the testimony of witnesses Detienne, Ellis, Fowles and Branstetter as to how far a car could be seen coming from the east on this crossing at night, was not material error, the court placing its decision apparently upon the fact that later in the case defendant introduced similar testimony. (See Appellant's original brief pages 49 and 61.)

Respectfully submitted,

SCARRITT, SCARRITT, JONES & MILLER,
Attorneys for Appellants.

Copy mailed this 6/11/16. to Att'ys for Respondent.
SCARRITT, SCARRITT, JONES & MILLER,
Att'ys for App'l't.

38 Which said motion to transfer to Court in Banc, is in words and figures as follows:

In the Supreme Court of Missouri, Division Number 1. October Term, 1915.

No. 17000.

WILLIAM J. MCWHIRT
vs.
THE CHICAGO & ALTON RAILROAD COMPANY and LOUISIANA & MISSOURI RIVER RAILROAD Appellants.

Motion of Appellants to Transfer Cause to Court in Banc.

Now come appellants, The Chicago & Alton Railroad Company and the Louisiana & Missouri River Railroad Company, and make application and move the court to transfer the above entitled cause to the Supreme Court of Missouri in banc for its decision, for the following reasons, to-wit:

There are federal questions involved in this cause, namely; As appears from appellants' seventh assignment of error herein, appellants assert and claim that trial court erred in holding that plaintiff made a case against defendant the Louisiana & Missouri River Railroad Company as lessor company, and erred in not declaring Section 3078 R. S. Missouri, 1909 void and of no effect as violative of Section 10 of Article II of the Constitution of the United States, and as violative of the Fourteenth Amendment of the Constitution of the United States; and said appellants, as appears from assignment of error Number 8, contended and still contend that the State Court erred in retaining jurisdiction of this cause after the filing in this cause of the petition and bond for removal to the federal court.

Appellants are the losing party in this cause in this division of the court, and therefore hereby make application for a transfer of the cause to court in banc as provided in and required by Section 4 of Article VI of the Constitution of Missouri, amendment of 1890.

SCARRITT, SCARRITT, JONES & MILLER,
Attorneys for Appellants.

Copy mailed this 6/11/16 to Att'ys for Resp.
SCARRITT, SCARRITT, JONES & MILLER,
Att'ys for App'l'ts.

39 *Transcript of Judgment from the Ralls County Circuit Court to the Supreme Court of the State of Missouri.*

WILLIAM J. MCWIRT, Plaintiff.

VS.

THE CHICAGO & ALTON RAILROAD COMPANY, and the LOUISIANA & MISSOURI RIVER RAILROAD COMPANY, Defendants.

Appearances:

E. S. Gantt, Jno. S. Gatson, Ben E. Hulse & E. L. Alford, Attorneys for Plaintiff.

Scarritt, Scarritt, Jones & Miller & J. O. Allison, Attorneys for Defendants.

40 In the Circuit Court of Ralls County.

STATE OF MISSOURI,
County of Ralls, ss:

Be it remembered that heretofore, to-wit; on the 16th day of November, 1911, during the regular November Term of said Court the same being the 10th day of said term, and before Hon. William T. Ragland, Judge of the Tenth Judicial Circuit of the State of Missouri, and Judge of this Court; the following among other proceedings were had in the above entitled cause and appear of record therein, to-wit:

WILLIAM J. MCWHIRT, Plaintiff,

VS.

THE CHICAGO & ALTON RAILROAD COMPANY AND LOUISIANA & MISSOURI RIVER RAILROAD COMPANY, Defendants.

Now, at this day come the parties herein by their respective attorneys—plaintiff by E. S. Gantt, John S. Gatson, Ben E. Hulse and E. L. Alford, and defendants by their attorneys—Scarritt, Scarritt and Jones, Charles M. Miller and J. O. Allison—and come also all same jurors as of yesterday, to-wit: J. T. Eales, J. A. Glascock, B. F. Keithley, W. J. Chisham, Eugene Coontz, R. A. Asher, R. M. Glaccock, Cleve Yeager, Kennith A. Keithely, John Hayden, Barney Fuqua, and H. D. Shulse, and the trial of this cause is now resumed. Thereupon at the close of all the evidence, comes the defendant, the Louisiana & Missouri River Railroad Company, and files its motion in the nature of an instruction, to-wit: "Comes now the defendant, the Louisiana & Missouri River Railroad Company, at the close of all the evidence, and moves the Court to instruct the jury that upon the pleadings and all the evidence your verdict must be in favor of the defendant, the Louisiana & Missouri River Railroad Company". Said motion now coming on to be heard, is by the Court seen, heard and duly considered, and by the Court refused. And comes now the Chicago & Alton Railroad Company and files

its motion in the nature of an instruction, to-wit: "Comes now the defendant, The Chicago & Alton Railroad Company, at the close of all the evidence, and moves the Court to instruct the jury
41 that upon the pleadings and all the evidence your verdict must be in favor of The Chicago & Alton Railroad Company, "Said motion now coming on to be heard, is by the Court seen, heard and duly considered, and by the Court refused. And the jury aforesaid having heard all the evidence in this cause adduced, as well as the arguments of the respective counsel for each side, and having received the instruction of the Court, and being fully advised concerning the issues herein submitted to them, retire by order of the Court to deliberate upon their verdict; And after due deliberation, said jurors return into open court, and here now in open court in the presence of all of them present to the Court their verdict in words and figures following, to-wit: "We the jury find for the plaintiff and against both defendants, and assess the amount of recovery at the sum of Ten Thousand Dollars ($10,000). R. C. Glascock, B. F. Keitheley, H. D. Shulse, Barney Fuqua, R. A. Asher, W. J. Chisham, J. A. Glascock, Eugene Coontz, Kennith A. Keithley, J. T. Eales, R. C. Glascock, Foreman." which said verdict is filed and recorded and the jury aforesaid discharged. Wherefore, it is considered, ordered and adjudged by the Court, in accordance with the verdict aforesaid that the plaintiff have and recover of the defendants herein the sum of Ten Thousand Dollars ($10,000.00), the amount of plaintiff's damage so assessed by the jury as aforesaid, with interest thereon from this day at the rate of (6) per cent per annum, together with all costs in and about this cause expended, and that hereof plaintiff have this execution for said damages and costs.

And afterwards to-wit: On the 20th day of November, 1911, and during the regular November, 1911, term of this court, the following further proceedings were had in the above entitled cause and appear of record therein, to-wit:

42 WILLIAM J. MCWHIRT, Plaintiff.

vs.

THE CHICAGO & ALTON RAILROAD COMPANY AND LOUISIANA & MISSOURI RIVER RAILROAD COMPANY, Defendants.

Now, at this day comes the defendant, the Louisiana & Missouri River Railroad Company by its attorneys of record herein and file their separate Motion for New Trial in this cause.

And afterwards, to-wit: On the same day and during the regular November, 1911 Term, the following further proceedings were had in the above entitled cause and appear of record therein, to-wit:

Now, at this day comes the defendant, the Chicago & Alton Railroad Company by its attorneys of record herein and file their separate Motion for New Trial in this cause.

And afterwards, to-wit: On the same day and during the regular November, 1911, Term, the following further proceedings were had in the above entitled cause and appear of record therein, to-wit:

Now, at this day come the defendants, The Chicago & Alton Railroad Company and the Louisiana & Missouri River Railroad Company, by their respective attorneys of record herein and file their Motion in Arrest of Judgment in this cause.

And afterwards, to-wit: On the 22nd day of December, 1911, and during the regular November, 1911, Term, of this court, the same being the 16th day of said term, the following further proceedings were had in the above entitled cause and appear of record therein, to-wit:

WILLIAM J. McWHIRT, Plaintiff,

vs.

THE CHICAGO & ALTON RAILROAD COMPANY AND LOUISIANA & MISSOURI RIVER RAILROAD COMPANY, Defendants.

43 At this day comes the parties herein by their respective attorneys of record, and defendant's The Chicago & Alton Railroad Company, Motion for a New Trial of this cause heretofore filed herein, now coming on to be heard, the same is seen, heard and duly considered by the Court, and by the Court overruled; and defendant's, the Louisiana & Missouri River Railroad Company, Motion for a New Trial of this cause heretofore filed herein, now coming on to be heard, the same is seen, heard and duly considered by the Court, and by the Court overruled; and defendants' Motion in Arrest of Judgment heretofore filed herein, is seen, heard and duly considered by the Court and by the Court overruled.

Thereupon the defendants herein file their application, duly verified by their affidavit, by their attorneys, for an appeal in this cause, which said application for an appeal is seen, heard and duly considered by the Court, found to be in due form, and by the Court sustained. It is therefore ordered by the Court that the defendants herein be and they are hereby allowed an appeal from the judgment in this cause by this Court, to the Supreme Court of the State of Missouri. It is further ordered by the Court that the defendants herein are granted leave to file Bill of Exceptions herein, both as to merits and all motions in this cause, on or before the 1st day of June, 1912. It is further ordered by the Court that the defendants bond be and is fixed at the sum of Twenty Two Thousand Dollars ($22,000.00), with leave to file same within Fifteen days (15) after this, the 22nd day of December, 1911, subject to the approval of the Clerk of this Court.

STATE OF MISSOURI,
County of Ralls, ss:

I, Benton B. Megown, Clerk of the Circuit Court of Ralls County, Missouri, do hereby certify that the foregoing writing is a true and complete copy of the record of the Judgment, together with the motions for New Trial and Motion in Arrest of Judgment and Order granting an appeal to the Supreme Court of the State of Missouri, as fully as the same remain of record in my office.

In testimony whereof I hereunto set my hand and affix the seal of our said Court, at office in New London, Mo.

[SEAL.] BENTON B. MEGOWN, *Clerk.*

44 Which said Abstract of the Record as called for in the præcipe herein, is in words and figures as follows:

In the Supreme Court of Missouri, Division No. 1, October Term, 1914.

No. 1700.

WILLIAM J. MCWHIRT, Respondent.

vs.

THE CHICAGO & ALTON RAILROAD COMPANY AND LOUISIANA & MISSOURI RIVER RAILROAD COMPANY, Appellants.

Appellants' Abstract of the Record.

The Records of the Circuit Court of Audrain County show that this cause was instituted in that court by plaintiff filing therein on December 17th, 1910, the original petition herein, returnable to the January, 1911, term of that court. That thereafter in said court plaintiff filed the following amended petition, upon which the case was thereafter tried, caption is omitted.

45 *Amended Petition.*

Plaintiff, for his first amended petition, states that the defendant, the Louisiana & Missouri River Railroad Company, is a corporation organized and existing under and by virtue of the laws of the State of Missouri, and has been such corporation for a period of forty years and more, owns a right of way and line of railroad commencing at Louisiana, at a point on the west side of the Mississippi River, in the State of Missouri, and running thence westerly through Pike County, Missouri, through the town of Bowling Green thence into and through Audrain County and through the city of Mexico in said last named county, and from Mexico southward through the counties of Audrain and Callaway to the Missouri River, at a point opposite the city of Jefferson in said state.

That the said defendant, the Louisiana & Missouri River Railroad Company, on or about the year 1872 did lease its said line of railroad and right of way to a corporation known as the Chicago & Alton Railroad Company, which said last named railroad company was at that time a corporation under the laws of Illinois, and operating a railroad in said state and over the tracks and right of way of the defendant, the Louisiana & Missouri River Railroad Company's said line in this state, and the said The Chicago & Alton Railroad Company in April, 1900, did lease all its property, including the

said line of railroad and right of way of the said Louisiana & Missouri River Railroad Company to the Chicago & Alton Railway Company with the full knowledge and consent of the defend-
46 ant, Louisiana & Missouri River Railroad Company, and said Chicago & Alton Railway Company did take full possession of said defendant's line and right of way and proceed to operate the same and did assume all the duties, obligations, liabilities and debts of said defendant and said defendant Louisiana & Missouri River Railroad Company did license and permit the said Chicago & Alton Railway Company under a running arrangement, to run engines and cars upon its said road and right of way, as above located in the state of Missouri.

That on or about the 8th day of March, 1906, the said Chicago & Alton Railway Company merged and consolidated with the said, the Chicago & Alton Railroad Company, a corporation organized and existing under the laws of the state of Illinois, which owns and operates a railroad in the said state; that by virtue of said consolidation, said defendant, the Chicago & Alton Railroad Company, operates a line of railroad over the said line of railroad belonging to its co-defendant in the state of Missouri, and has so operated said line of railroad over said line in the counties of Audrain, Callaway and Pike for a period of two years and more prior to the filing of this petition, and was operating its said line of its co-defendant, The Louisiana & Missouri River Railroad Company, on or about the 11th day of May, 1910, and was so operating said railroad and running its cars and locomotives and passenger trains thereon, with the knowledge and consent of its said co-defendant, the Louisi-
ana & Missouri River Railroad Company, at all dates herein
47 mentioned, and said consolidated corporation, under the name of The Chicago & Alton Railroad Company, one of the defendants herein, succeeded to all the rights which were possessed and enjoyed by the first Chicago & Alton Railroad Company and the former Chicago & Alton Railway Company under the leases referred to above and also assumed all the duties and liabilities created by said leases, and that under the laws of the State of Missouri the defendants herein are liable to the plaintiff for the damages sued for in this action.

Plaintiff states that on the 11th day of May, 1910, at about 8 p. m. he was traveling on foot north on a public road or street commonly called D. Street in the City of Vandalia, Missouri, and that said D. Street crosses defendant railway companies' track in said city of Vandalia; that in traveling north on said street he attempted to walk over and across the tracks of defendant in said D. Street, and while he was in the act of crossing said tracks he was struck by cars, engine and tender, running west on defendant railway companies' tracks, which was then and there being backed over and across said D. Street and that said cars, engine and tender were owned by and under the control of the defendants, and the said plaintiff was greatly injured, as more fully stated hereinafter. And plaintiff says his said injuries were caused and produced by the negligence and want of care of the defendants in this, to-wit: That the

city of Vandalia, Missouri, is and was at all times herein mentioned a municipal corporation of the fourth class, organized under the general laws of the State of Missouri; that long prior to the
48 happening of the wrongs complained of herein the said city had duly passed, published and put in full force and effect an ordinance, by which ordinance it is made and declared to be unlawful for any railroad company, its agents, servants or employees to run upon its tracks or switches within that part of the corporate limits of said city where said railroad tracks or switches are unfenced, any locomotive car or train of cars at a rate of speed to exceed 8 miles per hour, which ordinance was duly passed and published in book form and promulgated by said city; that said ordinance was in full force and effect at the time of the wrongs complained of.

Plaintiff further states that at and near said crossing the tracks of defendant railway companies are unfenced and that said crossing is in the corporate limits of the city of Vandalia and in the heart of said city, and that said city is a large and populous city, and that as defendants well knew, the said crossing is always and at all times used by a great number of travelers both on foot and in vehicles; that it is and was the duty of the defendants to have their locomotives and cars under full control and to move the same very slowly and to keep a look out for travelers when approaching said crossing and to have a light on the front end of cars being moved about on the tracks and switches of defendants in said city at night and to have some person in advance and on the front end of said cars when the same are being moved over said crossing in order to give travelers crossing said crossing the necessary warning of the approach of said cars. But the plaintiff says that the defendant railroad com-
49 panies, their agents and servants, in violation of their duty and in violation of the ordinance heretofore pleaded, carelessly and negligently ran a train of cars and locomotive backward up to and over said crossing at a high rate of speed, to-wit; about fifteen miles per hour and carelessly and negligently failed to run said train at a slow or lawful rate of speed or to have or to keep the same under control, and negligently and carelessly failed to keep a look out for persons on said crossing.

Plaintiff further says that the defendants did not, within 80 rods, or within any other distance of said crossing, ring the bell or blow the whistle on said train of cars and locomotive and keep the same ringing and blowing until said engine had passed said crossing, but negligently and carelessly and unlawfully failed and refused to give any signals at all of the approach of said train at said crossing but negligently ran the said cars against said plaintiff.

Plaintiff further says that the defendants carelessly and negligently ran and backed said cars, engine and tender upon and across said street in said city at the time above set forth without having anyone in charge thereof and without having anyone in advance of said cars to indicate its approach and without having any one at the front end of said car to keep a close look out for pedestrains who were to defendants' knowledge in the habit of crossing its said

railroad at said point frequently and at all hours of the day and night.

Plaintiff further says that after the employees of the defendant railroad companies saw and knew, or by the exercise of due
50 diligence might have seen and known, that plaintiff was in a perilous position and unaware thereof and unable to escape from the impending danger; that the said defendants negligently failed to sound the usual and ordinary signals of danger in time to avert the injury or at any other time, and negligently and carelessly failed and neglected to stop or slacken the speed of said cars and locomotive in time to avert an injury or collision, when, as a matter of fact, said cars and locomotive might by the exercise of due care have been stopped or the speed thereof slackened in time to avert such injury, and if said signals had been given as they might and should have been given, had defendant exercised due care, the said collision and injury would have been averted.

Plaintiff further states that by reason of the carelessness and negligence of the said Chicago & Alton Railroad Company, its agents, servants and employees aforesaid, he sustained the following described and permanent injuries, to-wit:

His legs and feet were mashed, crushed, torn and broken by said car and train of cars so that one of them had necessarily to be amputated a short distance below the knee and the other foot was greatly injured; that the injuries caused him the most intense bodily pain and mental anguish and will cause him great pain and suffering in the future; that, as a result of said injuries he has become a helpless and incurable cripple; that at the time of the happening of the accident and catastrophe in question and prior thereto he was a strong able-bodied and vigorous man capable of earning at his busi-
51 ness of farming the sum of $35.00 per month, but on account of said injuries his earning capacity has been entirely destroyed; that he has already lost all of this time from his business, the reasonable value of which is about the sum of $500.00 and will lose all of his time for the remainder of his life and has been put to great expense for medicine, physicians, surgeons, nurses, board and lodging.

Wherefore plaintiff says by reason of the premises and cause of action as accrued to him against these defendants he has been damaged in the sum of $25,000.00, for which he prays judgment and for all of his costs herein incurred and expended.

JOHN S. GATSON,
E. S. GANTT,
Attorneys for Plaintiff.

In due time, to-wit on the first day of the returnable term, January Term, 1911, and within the time required by law of defendant to answer, there was filed in this cause in the Circuit Court of Audrain County the following:

Petition for Removal.

(Omitting Caption.)

Comes now The Chicago & Alton Railroad Company, one of the defendants in the above entitled cause, for the sole purpose of this removal and not to enter its appearance herein, and respectfully shows to this honorable court that your petitioner is one of the defendants in the above entitled action, and that said action has been commenced against it in said court by the plaintiff.

52 That said action is of a civil nature and that the matter and amount in dispute in this action exceed the sum of Two Thousand Dollars, exclusive of interest and costs, to-wit, the sum of Twenty-five Thousand Dollars ($25,000.00).

Plaintiff in his petition claims in substance that the Louisiana & Missouri River Railroad Company on about the year 1872 leased its line of railroad to The Chicago & Alton Railroad Company which company thereafter leased the said line of railroad to the Chicago & Alton Railway Company, and that thereafter during the year 1906 the Chicago & Alton Railway Company merged and consolidated with The Chicago & Alton Railroad Company, and that by virtue of such consolidation it is alleged your petitioner was operating the railroad at the time of the matters complained of in the petition; that on or about May 11, 1910, plaintiff was traveling north on a public road or street in the city of Vandalia, Missouri which crossed the railroad right of way and while traveling on said street and in the act of crossing the railroad tracks was struck by cars, engine and tender which were being backed across said street, and that said cars, engine and tender were owned by and under the control of the defendants whereby plaintiff claims he was injured, which injury necessitated the amputation of his left leg. Plaintiff in his petition further claims in substance that the defendants were negligent in not keeping a look out ahead for travelers on the crossing, or a light on the front of the cars; that they were moving at an excessive rate of speed, contrary to an or-

53 dinance, and without giving any warning by the ringing of the bell or the blowing of the whistle on the engine, or having a person on the end of the car; all of which allegations of plaintiff's petition your petitioner denies, except as herein stated and admitted in this petition for removal, and denies that it is responsible in any way for the injuries, if any, claimed to have been sustained by the plaintiff, William J. McWhirt.

Your petitioner further states that the plaintiff, William J. McWhirt, at the time of the filing of this suit, was, and still is a citizen and resident of the State of Missouri, residing in the County of Audrain, and that your petitioner is a corporation duly organized and created under and by virtue of the laws of the state of Illinois, and was at the time of the commencement of this suit, and still is, a citizen and resident of the State of Illinois, and that the con-

troversy herein is solely between citizens of different states, as above set forth.

Your petitioner further avers that the Louisiana & Missouri River Railroad Company is a corporation organized and created under the laws of the State of Missouri by a special act of said State, and that the State of Missouri duly enacted a law which was duly approved, which law is entitled as follows: "An Act to amend an Act entitled, An Act to amend an Act to incorporate the Louisiana & Missouri River Railroad Company, approved March 24, 1868, and to consolidate various acts relating to said company," which act duly and legally became a law on the 19th day of January 1870,
and is found in the Session Acts of the State of Missouri
54 for this date, to which reference is hereby made; that said
law among other things provided:

"Sec. 43. It shall be lawful for said company, whenever the interests of said road or its branches may require it, to unite or consolidate the same, for running purposes, operation or business, with any railroad company, upon such terms as may be mutually agreed upon by the respective parties, and to contract with any such company for the running of trains over and use of their road, depots, buildings and all other appurtenances connected therewith, and may in like manner lease their said road, or any branch thereof, to any such railroad company for a period of years, and execute good and sufficient transfers of the same, with all property, machinery and appurtenances thereto belonging.

"Sec. 44. All acts or parts of acts inconsistent with this act are hereby repealed.

"Sec. 45. This act shall take effect and be in force from and after sixty days from its passage; provided, it shall within that time be accepted by a vote of the directors of said company, approved June 19, 1870."

Your petitioner further avers that the said law and act were duly and legally accepted by a vote of the directors of the said Louisiana & Missouri River Railroad Company within the time provided in said act and law, and that by virtue of said act and law the defendant, Louisiana & Missouri River Railroad Company, was given the right to enter into a contract for the operation of said railroad
by any other company, and also given the right to lease said
55 road free from any liability by reason of the acts of the
operating or lessee, and said Louisiana & Missouri River Railroad Company did on the 1st day of August 1870, duly and legally lease its said road for one thousand years upon the express terms and conditions expressed in such lease, that the lessor should not be liable but that the lessee only should be liable for all acts and conduct of the lessee, and said road was at the place and time in question being run and operated by your petitioner under such lease and upon such terms therein contained, and since the date of the execution of said lease the Louisiana & Missouri River Railroad Company has not owned, controlled or operated any railroad; and the Louisiana & Missouri River Railroad Company is not liable under its lease or in law for any of the acts either of commission or omission of the operating company with which it may have en-

tered into a contract, or to which it leased its road, and the defendant, Louisiana & Missouri River Railroad Company, is not liable or responsible in any way by reason of the matters complained of in plaintiff's petition, and plaintiff's petition states no cause of action against said defendant Louisiana & Missouri River Railroad Company.

Your petitioner further avers that the Louisiana & Missouri River Railroad Company was joined as a party defendant solely for the purpose of attempting to fraudulently and illegally deprive the United States Circuit Court, to which this suit is removable, of jurisdiction.

Your petitioner further avers that if the said Louisiana & Missouri River Railroad Company is liable or responsible by
56 virtue of the matters complained of in plaintiff's petition (Which your petitioner expressly denies) then the controversy is still a controversy between citizens of different states, in this, that the controversy as between the plaintiff and your petitioner is a separate, separable and distinct controversy and different cause of action, if any, from the controvery and cause of action, if any, between the plaintiff and the Louisiana & Missouri River Railroad Company, as is disclosed by plaintiff's petition in this case, and the substance of what plaintiff claims in his petition as heretofore set out in this petition for removal.

Your petitioner herewith presents good and sufficient bond, as provided by the statutes in such cases, that it will on or before the next ensuing session of the United States Circuit Court for the Eastern Division of the Eastern District of Missouri at St. Louis file therein a transcript of the record of this action; and for the payment of all costs which may be awarded by said court, if said Circuit Court shall hold that this suit was wrongfully or improperly removed thereto.

Your petitioner further prays that this court proceed no further herein except to make the order for removal as required by law, and to accept the bond presented herewith, and direct a transcript of the record herein to be made for the United States Circuit Court, as provided by law, and as in duty bound your petitioner will ever pray.

SCARRITT, SCARRITT & JONES,
Attorneys for Petitioner.

57 STATE OF MISSOURI,
County of Jackson, ss:

W. B. Bostian of lawful age, being duly sworn, on his oath states that he is the agent and one of the attorneys for the petitioner in the above entitled cause, and as such makes this affidavit for and on its behalf; that the matters and facts set forth in the foregoing petition are true as he verily believes.

W. B. BOSTIAN.

Subscribed and sworn to before me this 14th day of January, 1911.

My commission expires September 15, 1913.

[SEAL.] BERTHA L. JOHNSON,
Notary Public.

A bond in due form and approved by the court was filed with the petition for removal.

During the same term, upon said petition for removal being denied, defendant C. & A. Rd. Co. filed in this cause the following, omitting caption:

Bill of Exceptions.

Be it remembered that on January 16, 1911, the defendant The Chicago & Alton Railroad Company duly filed and presented to this court its petition and bond for removal in this cause to the United States Circuit Court for the Eastern Division of the Eastern District of Missouri at St. Louis, which said petition and bond for removal are in words and figures as follows, to-wit:

(Here copy of said petition and bond for removal.)

58 Thereafter, on January 26, 1911, the said petition and bond for removal to the United States Court was taken up by said state court, and the court after hearing the same denied the petition for removal but approved the bond and had entered an order of record overruling and denying said petition for removal and an order approving the bond.

Now, therefore, on this 28th day of January, 1911, the same being during the January Term, 1911, of the Circuit Court of Audrain County, State of Missouri, the defendant, The Chicago & Alton Railroad Company, presents this its bill of exceptions to the action and rulings of the court in denying said petition for removal, and in not ordering the case removed to the United States Court, and prays the court to sign and order filed this its bill of exceptions to the above action and rulings of the court. Whereupon, the court, being fully advised, signs and seals said bill of exceptions and orders that it be filed and made a part of the record in this cause, which is accordingly done on said date, and within the time allowed by the court.

(Signed) JAMES BARNETT,
Judge of the Circuit Court of Audrain County, Missouri.

Thereafter the defendants filed herein, in said Court, the following answer, captions omitted:

Separate Answer of the Chicago & Alton Railroad Company.

Comes now the defendant The Chicago & Alton Railroad Company, and for answer to plaintiff's amended petition herein

59 states that this cause has duty and legally been removed according to law to the United States Circuit Court for the Eastern Division of the Eastern District of Missouri at St. Louis, and that this court has no jurisdiction to proceed further herein.

Further answering this defendant denies each and every allegation in said petition contained.

Further answering this defendant states that if the plaintiff was injured at the time and in the manner alleged in his petition it was

through his own fault and negligence directly contributing thereto in whole or in part.

Further answering this defendant states that the Louisiana & Missouri River Railroad Company has been improperly and illegally made a party defendant to this suit, and that there is a misjoinder of parties defendant.

Wherefore, having answered defendant prays to be discharged and allowed to go hence with its costs in this behalf extended.

SCARRITT, SCARRITT & JONES,
Attorneys for Defendant, The Chicago & Alton R. R. Co.

Separate Answer of Louisiana & Missouri River Railroad Company.

Now comes defendant, Louisiana & Missouri River Railroad Company, and for its separate answer to plaintiff's amended petition herein denies each and every allegation in said petition contained.

Further answering, this defendant states that if the plaintiff was injured at the time, in the manner and at the place alleged in
60 his petition it was through his own fault and negligence directly contributing thereto in whole or in part.

Further answering, defendant states that section 1060, Chapter 12, of Revised Statutes of Missouri of 1899, under which it is sought to hold this defendant liable in this action, is unconstitutional and void as to this defendant for the reason that defendant, Louisiana & Missouri River Railroad Company, was organized and created a corporation by an act of the Legislature of the State of Missouri entitled as follows, "An Act to amend an act entitled, 'An Act to amend an act to incorporate the Louisiana & Missouri River Railroad Company, approved March 24, 1868,' and to consolidate various acts relating to said company," which act duly and legally became a law on January 19, 1870, and prior to the amendment of said section 1060, Revised Statutes of Missouri of 1899, which said act incorporating this defendant grants to said company the right to lease its road or any branch thereof to any other railroad without any conditions or limitations whatsoever and without thereby assuming all or any liability for damage occasioned by the negligence of the lessee, and to hold said section 1060, Revised Statutes of Missouri, 1899 as applicable to this company would be contrary to section 15 of Article 2 of the Constitution of Missouri, which provides that no law impairing the obligation of contracts or retrospective in its operation can be passed by the General Assembly, and would be contrary to and in violation of Section 10 of Article 2 of the Constitution of the United States which provides that "no state shall * * *
61 pass any bill of attainder, ex post facto law or law impairing the obligation of contracts," and in violation to the Fourteenth Amendment to the Constitution of the United States, which requires that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Further answering, this defendant states that this cause has been

duly and legally removed according to law to the United States Circuit Court for the Eastern Division of the Eastern District of Missouri at St. Louis, and that this court has no jurisdiction to proceed further herein.

Further answering, this defendant states that it has been improperly and illegally made a party defendant to this suit, and that there is a misjoinder of the parties defendant.

Wherefore, having answered this defendant prays to be dismissed with its costs.

J. D. OREAR AND
C. M. MILLER,
Attorneys for Defendant, Louisiana & Missouri River Railroad Company.

The court records further show that this cause was tried in the Circuit Court of Audrain County at the June term, 1911, and that at such trial the jury disagreed and were discharged; that thereafter the cause was duly taken by change of venue to the Circuit Court of Ralls County; that the cause was tried in the Circuit Court of Ralls County at the November, 1911 term, and that on November
62 17, 1911, a verdict was rendered by eleven jurors and a general judgment entered thereon against both de- *1899, under which it is sought to hold this defendant* fendants in the sum of $10,000. That within four days and during the same term defendants filed their motions for new trial and in arrest, hereinafter set out, which were overruled and such ruling excepted to. A certified copy of such judgment and of the order allowing the appeal of defendants herein was in due time filed in the Supreme Court. The records of the Ralls County Circuit Court further show that defendants' bill of exceptions hereinafter set out was duly allowed, signed and filed and made a part of the record; and that the appeal of defendants and each of them was duly taken and allowed to this, the Supreme Court.

Counsel for plaintiff: We offer in evidence the lease from the Louisiana & Missouri River Railway Company to the Chicago & Alton Railroad Company, dated August 1, 1870.

Objected to as immaterial to any issue in this case—overruled and excepted to.

The above lease is in words and figures as follows: to-wit:

"This indenture made and entered into this first day of August, in the year of our Lord one thousand eight hundred and seventy, by and between the Louisiana and Missouri River Railroad Company, a corporation created and organized under the laws of the State of Missouri, party of the first part, and the Chicago and Alton Railroad Company, a corporation created and organized under the laws of the State of Illinois, party of the second part: Witnesseth, that the said party of the first part * * * doth grant, demise and lease unto the said party of the second part, its successors and assigns, all and singular that incomplete and unfinished railroad and branch, together with the railroad track, right-of-way and depot grounds acquired and to be acquired, engine houses, water tanks, and struc-

tures of every kind whatsoever, as the same is now partially constructed and located, owned and occupied by said party of the first part, between the City of Louisiana, in the State of Missouri,
63 thence westwardly via the towns of Mexico and Glasgow to Kansas City, in the State of Missouri, * * * To have and to Hold the said above demised premises, together with all and singular the appurtenances thereof, unto the said party of the second part, and its successors and assigns, from and after the first day of August, in the year one thousand eight hundred and seventy, for the term of one thousand years. * * * And the said party of the second part hereby further covenants and agrees, to and with the said party of the first part, its successors and assigns, that it, the said party of the second part, shall and will accept and operate under the terms of this lease, that portion of said railroad which lies between Louisiana and Mexico, so soon as the same shall be ready for operation; and that thereafter it, the said party of the second part, will accept and operate sections of said railroad and branch, not less than twenty miles in length. as the same shall be completed and ready for operation, in connection with the division between Louisiana and Mexico aforesaid; and that it, the said party of the second part, will from time to time, as occasion may require, furnish all necessary rolling stock for the maintenance and operation of said portions of said railroad so accepted by it, said party of the second part as aforesaid, and that it will maintain and keep in repair the same; and that upon the completion of said railroad and branch, it, the said party of the second part, will equip, operate and maintain, the same, together with said ferry boats, so long as the said boats shall
64 be used, under the terms of this lease. * * * the said party of the second part will pay off and satisfy all damages growing out of the operation of said line of railroad, whether the same be founded on claims for non-performance of duty as common carriers of passengers or freight, injuries to cattle or other animals along the line of said demised railroad, losses arising from fires communicated along said line of railroad, from the locomotive engines used thereon, or from any other cause occurring thereafter, through the negligence or dereliction of duty of the party of the second part in the conduct of the business and traffic of said line of railroad. * * *"

Duly executed by both parties thereto.

In the Circuit Court of Ralls County, Missouri,

WILLIAM J. MCWHIRT, Plaintiff,

vs.

THE CHICAGO & ALTON RAILROAD COMPANY et al., Defendants.

Agreement.

It is hereby agreed by and between the parties hereto that owing to the fact that it is impracticable and cumbersome to attach all the ex-

hibits to the bill of exceptions in this cause, the exhibits need not be attached and made a part of the bill of exceptions at the time it is signed and filed, but that it will be sufficient and agreeable to all parties hereto to show said exhibits, leases and articles of consolidation in the printed abstract of the record on appeal and no point will be made by any of the parties hereto that the said exhibits were not attached and made a part of the original bill of exceptions, it being sufficient for the bill of exceptions, to simply state where the
65 exhibit is offered in evidence, "Clerk will here copy or insert said exhibit."

SCARRITT, SCARRITT, JONES & MILLER,
Attorneys for Defendants.
E. S. GANT AND J. S. GATSON,
Attorneys for Plaintiff.

Counsel for plaintiff: Next we offer in evidence lease from the Chicago & Alton Railroad Company to the Chicago & Alton Railway Company, dated April 3. 1900.

Court: Same objection on the part of each defendant?

Counsel for defendants: Yes, sir.

Court: Objection overruled; excepted to.

Which lease is substantially the same in its terms as the lease above of the La. & Mo. River Rd. Co. to the C. & A. Rd. Co., except that the period of the present lease is "in perpetuity."

Counsel for plaintiff: We next offer in evidence certified copy of the Charter and Articles of Consolidation of the Chicago & Alton Railroad Company and the Chicago & Alton Railway Company.

Court: Same objection on the part of each defendant?

Counsel for defendants: Yes, sir.

Court: Objection overruled.

To which ruling of the court defendants then and there at the time excepted and still except.

The above paper admitted in evidence shows a consolidation
66 of the Chicago & Alton Railroad Co. with the Chicago & Alton Railway Co., on August 6, 1906, under the laws of Illinois, with the name of the Chicago & Alton Railroad Co.

For the purposes of this case only, it is admitted: That the railroad right of way in Vandalia, Missouri, described in the evidence across and east of D Street was included in the lease from the Louisiana and Missouri River Railroad Company to the Chicago & Alton Railroad Company, and in the lease from the lat-er Company to the Chicago & Alton Railway Company being the lease offered in evidence; and thereafter in 1906, said Chicago & Alton Railroad Company and Chicago & Alton Railway Company were consolidated under the laws of Illinois under the consolidated name of Chicago & Alton Railroad Company, which Company was operating the railroad in question at the time of plaintiff's accident here in question. And that the Louisiana & Missouri River Railroad Company was incorporated by the act of the Missouri Legislature, approved January 19,

1870, and published in Missouri session acts of 1870, at page 93 and following, which may be considered in evidence without further proof, and that such charter was accepted by a resolution of the directors of that Company within sixty days after the passage of said act, to-wit, on January 19, 1870.

Plaintiff rests.

Defendants filed demurrers in words and figures as follows, to-wit:

Comes now the defendant, Chicago & Alton Railroad Company, and moves the court to instruct the jury that upon the pleadings and evidence they must return a verdict for this defendant.

Comes now the defendant, Louisiana & Missouri River Railroad Company, and moves the court to instruct the jury that upon the pleadings and evidence they must return a verdict in favor of this defendant.

Which demurrers and peremptory instructions the court overruled, to which ruling of the court defendants, and each of them, then and there duly excepted.

67 Where upon at the request of the plaintiff the court gave to the jury the following instructions:

Plaintiff's Instruction No. 6.

The court instructs the jury that if they find from the evidence that the defendant, the Louisiana & Missouri River Railroad Company, was at the time of the happening of the alleged injury, of which plaintiff complains, the owner of a railroad with several tracks running through the city of Vandalia, Missouri and crossing the streets thereof; and if you further believe that the defendant, the Chicago & Alton Railroad Company, was, on and prior to the 11th day of May, 1910, the lessee of said railroad and all of the tracks of said railroad running through the city of Vandalia, Missouri, as explained in other instructions given in the case; and if you further believe the defendant, the Chicago & Alton Railroad Company, was engaged in moving trains operated by steam thereon, then in the management of said trains the said defendant The Chicago & Alton Railroad Company, was bound to use such care and caution to prevent injury to persons traveling along said streets where they are crossed by said tracks, as prudent and discreet persons would have used and exercised under like or similar circumstances; and if you further believe that on the night of the 11th day of May, 1910, the plaintiff while crossing the railroad of the defendants in D. Street in said City, was struck and run over by a car of the defendant The Chicago & Alton Railroad Company, and injured, as stated in the testimony, and if said injury was caused by the negligence of the defendant, the Chicago & Alton Railroad Company or its agents in charge of said cars, as explained in instructions numbered 2, 3, 4 and 5, given for plaintiff, and if by the exercise of ordinary care and caution by said defendant, the Chicago & Alton Railroad Company, or its agents in charge of said cars, the accident causing the said injury could have been avoided,

the plaintiff is entitled to recover unless you believe from the evidence that the plaintiff was guilty of negligence which contributed to his injuries and you are instructed that contributory negligence on the part of the plaintiff must be established by the greater weight of all the evidence in the case, and unless it be so established you cannot find for the defendant on that ground.

68 To the giving of which instructions and each of them defendants and each of them then and there at the time objected and excepted and still except.

Defendants, and each of them requested the court to give the following instructions:

"Comes now the defendant, the Chicago & Alton Railroad Company, at the close of all the evidence, and moves the court to instruct the jury, that upon the pleadings and all the evidence your verdict must be in favor of the defendant, the Chicago & Alton Railroad Company."

"Comes now the defendant. the Louisiana & Missouri River Railroad Company, at the close of all the evidence, and moves the court to instruct the jury that upon the pleadings and all the evidence, your verdict must be in favor of the defendant, the Louisiana & Missouri River Railroad Company."

"The court instructs the jury that Section 3078 R. S. Mo. 1909 (Sec. 1060 R. S. 99) is inapplicable to defendant, Louisiana & Missouri River Railroad Company, and that section is unconstitutional and void as to this defendant, in that it is contrary to Section 15 of Article 2 of the Constitution of Missouri, which provides that no law impairing the obligations of contracts, or retrospective in its operation, can be passed by the General Assembly."

"The court instructs the jury that Section 3078 R. S. Mo. 1909 (Sec. 1060 R. S. 99) is inapplicable to defendant, Louisiana & Missouri River Railroad Company, and that said section is unconstitutional and void in that, as to this defendant, it violates Section 10 of Article 2 of the Constitution of the United States, which provides that no state shall pass any law impairing the obligations of contracts, and violates the 14th amendment to the Constitution of the United States, which provides -hat no state shall deny to any person the equal protection of the law."

69 Which instructions the court refused to give and refused same, to which action of the court in refusing to give said instructions and each of them, defendants, and each of them, at the time, duly objected and excepted, and still except.

Under the instructions of the court, the jury on the 17th day of November, 1911, returned the following verdict:

We the jury find for the plaintiff and against both defendants

and assess the amount of recovery at the sum of Ten Thousand Dollars ($10000).

R. C. GLASCOCK,
B. F. KEITHLY,
H. D. SHULSE,
BARNEY FUQUA,
R. A. ASHER,
W. J. CHISHAM,
J. A. GLASCOCK,
EUGENE KOONTZ,
K. A. KEITHLY,
I. T. EALES,
R. A. GLASCOCK, *Foreman.*

To which verdict the defendants and each of them then and there at the time excepted and still except.

And on the 20th day of November, 1911, and within four days after the rendering of said verdict and at the same term of court thereof the defendant, Chicago & Alton Railroad Company, filed its motion for new trial as follows:

In the Circuit Court of Ralls County, Missouri, November Term, 1911.

WILLIAM J. MCWHIRT, Plaintiff,
vs.
THE CHICAGO & ALTON RAILROAD COMPANY et al., Defendants.

Separate Motion for New Trial of the Chicago & Alton Railroad Company.

Comes now the defendant The Chicago & Alton Railroad Com,-pany, and moves the court to set aside the verdict and judgment heretofore rendered in this cause, and to grant this defendant a new trial for the following reasons, to-wit:

70 1. The court erred in overruling the demurrer of The Chicago & Alton Railroad Company to plaintiff's petition.

2. The court erred in overruling this defendant's demurrer to the evidence submitted at the close of plaintiff's evidence in chief; and in overruling and refusing the peremptory instruction requested by this defendant at the close of all the evidence.

3. The court erred in admitting incompetent and illegal evidence on behalf of the plaintiff over the objections of this defendant, and the defendant, the Louisiana & Missouri River Railroad Company, and in refusing to admit competent, illegal and material evidence offered on behalf of the defendants.

4. The court erred in giving the instructions and each of them on behalf of the plaintiff.

5. The court erred in not giving the instructions and each of them offered and requested on behalf of the defendant, The Chicago

& Alton Railroad Company and the other defendant herein, but by the court refused.

6. The court erred in modifying the instructions and each of them offered and requested on behalf of this defendant and the other defendant herein, and in giving same as modified.

7. The court erred in modifying the instructions and each of them.

8. The court erred in giving the instructions and each of them of its own motion.

9. The court erred in refusing to sustain and in overruling the motion and the affidavit of surprise filed by this defendant
71 and the other defendant herein at the close of plaintiff's evidence in chief, and in refusing to require plaintiff to amend his petition on terms in response thereto.

10. The court erred in overruling defendant's objection made at the beginning of the trial to the introduction of any evidence under the petition for the reason that the same did not state facts sufficient to constitude a cause of action against this defendant, and the other defendant herein.

11. Because the verdict is excessive; and is so large as to indicate and show prejudice and passion on the part of the jury against the defendants.

12. The verdict and judgment are contrary to the evidence, and against the weight of the evidence, and against the law, and the law as declared by the court.

13. The verdict and judgment are not according to law, and not in proper form or substance as required by law.

14. Because this defendant is improperly and illegally joined as defendant with the Louisiana & Missouri River Railroad Company, and there is a misjoinder of parties defendant.

15. Because of illegal and improper conduct of plaintiff's counsel and plaintiff with members of the jury to the prejudice of this defendant.

16. Because of illegal and improper conduct of plaintiff's attorney during the argument of the case to the jury, which was prejudicial to this defendant.

17. Because the court erred in refusing defendant's motion
72 to discharge the jury because of improper conduct of counsel for plaintiff.

18. Because this court has no jurisdiction of this cause the same having heretofore been properly and legally removed by this defendant to the United States Circuit Court for the Eastern Division of the Eastern District of Missouri.

19. Because of newly discovered evidence since the trial, which is relevant, competent and material, on behalf of this defendant, and disproves the evidence on behalf of plaintiff on material issues in this cause.

20. Because of misconduct on the part of the jury.

21. Because the court erred in refusing defendant's, Louisiana & Missouri River Railroad Company, peremptory instruction offered

at the close of plaintiff's evidence in chief, and at the close of all the evidence.

Wherefore defendant prays the judgment of the court.

J. O. ALLISON AND
SCARRITT, SCARRITT & JONES,
Attorneys for Defendant, The Chicago & Alton Railroad Company.

Which said motion the court overruled on the 22nd day of December, 1911, and at the same term of court, to which ruling and order of the court the defendant the Chicago & Alton Railroad Company then and here at the time excepted and still excepts.

And on the 20th day of November, 1911, and within four days after the rendering of said verdict and at the same term of court thereof, the defendant the Louisiana & Missouri River Rail-
73 road Company, filed its motion for new trial as follows:

In the Circuit Court of Ralls County, Missouri, November Term, 1911.

WILLIAM J. MCWHIRT, Plaintiff,
vs.
THE CHICAGO & ALTON RAILROAD COMPANY et al., Defendants.

Separate Motion for a New Trial of the Louisiana & Missouri River Railroad Company.

Comes now the defendant, Louisiana & Missouri River Railroad Company, and moves the court to set aside the judgment and verdict heretofore rendered in this cause, and to grant this defendant a new trial for the following reasons, to-wit:

1. The court erred in overruling the demurrer of the Louisiana & Missouri River Railroad Company to plaintiff's petition.

2. The court erred in overruling defendant's demurrer to the evidence submitted at the close of plaintiff's evidence in chief and in overruling and refusing the peremptory instruction requested by this defendant at the close of all the evidence.

3. The court erred in overruling defendant's motion and affidavit of surprise filed at the close of plaintiff's evidence in chief and in refusing to require plaintiff to amend his petition on terms in response thereto.

4. The court erred in admitting incompetent and illegal evidence on behalf of the plaintiff, over the objections of this defendant, and the defendant, The Chicago & Alton Railroad Company
74 and in refusing to admit competent, legal and material evidence offered on behalf of this defendant and The Chicago & Alton Railroad Company.

5. The court erred in giving the instructions, and each of them requested on behalf of the plaintiff.

6. The court erred in not giving the instructions, and each of

them, offered and requested on behalf of the defendant, Louisiana & Missouri River Railroad Company, and other defendant herein, but by the court refused.

7. The court erred in modifying the instructions, and each of them, offered and requested on behalf of this defendant and the other defendant herein, and in giving same as modified.

8. The court erred in modifying the instructions, and each of them.

9. The verdict is excessive; and is so large as to show prejudice and passion on the part of the jury.

10. The verdict and judgment are contrary to the evidence and against the weight of the evidence; and against the law as declared by the court.

11. Because the verdict and judgment are against the law and not in form as required by law.

12. Because the court erred in giving instructions, and each of them, of its own motion.

13. Because this defendant is improperly and illegally joined as defendant with the Chicago & Alton Railroad Company.

14. Because of misconduct on the part of the jury.

15. Because of improper and illegal conduct on the part of plaintiff's attorneys and plaintiff with the jury.

75 16. Because of improper and illegal conduct on behalf of the attorneys for the plaintiff during the argument of the case to the jury.

17. Because the court erred in refusing this defendant's motion to discharge the jury on the motion of the Chicago & Alton Railroad Company, because of improper conduct of counsel for plaintiff.

18. Because the court has not jurisdiction of this cause, the same having been heretofore legally and properly removed by the Chicago and Alton Railroad Company, to the United States Circuit Court for the Eastern District of Missouri.

19. Because of newly discovered evidence since the trial of the case which is material and relevant and disproves the evidence of plaintiff on material issue in this case.

20. Because Section 3078 R. S. Mo. 1909 (Sec. 1060 R. S. Mo. 1899) by which it is sought to hold this defendant liable in this action, is unconstitutional and void as to this defendant for the reason that defendant, Louisiana & Missouri River Railroad Company, was organized and created a corporation by an Act of the Legislature of the State of Missouri entitled as follows: "An act to amend an Act, entitled an Act to amend an Act to incorporate the Louisiana & Missouri River Railroad Company, approved March 24th, 1868, and to consolidate various Acts relating to said Company" which Act duly and legally became a law on January 19, 1870, Revised Statutes of Missouri, 1899, which said Act incorporating this defendant grants to said company the right to lease its road

76 or any branch thereof to any other railroad without any conditions or limitations whatsoever and without thereby assuming all or any liability for damage occasioned by negligence of the lessee and to hold said Section 1060 Revised Statutes of Missouri,

1899, as applicable to this company would be contrary to Section 15 of Article 2 of the Constitution of Missouri which provides that no law impairing the obligation of contracts or retrospective in its operation can be passed by the General Assembly, and would be contrary to and in violation of Section 10 of Article 2 of the Constitution of the United States which provides that "no state shall pass any bill or attainder or ex post facto law or laws impairing the obligations of contracts," and in violation of the Fourteenth Amendment to the Constitution of the United States which declares that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

21. Because the court erred in overruling defendant's objection made at the beginning of the trial to the effect that the petition did not state facts sufficient to constitute a cause of action against this defendant.

Wherefore, the defendant prays the judgment of the court.

C. M. MILLER,
Attorney for Defendant, Louisiana & Missouri River Railroad Company.

77 Which said motion the court overruled on the 22nd day of December, 1911, at the same term of court, to which ruling of the court the defendant, Louisiana & Missouri River Railroad Company, then and there at the time excepted and still excepts.

Whereupon the defendants filed their motion in arrest of judgment, on the 20th day of November, at the same term of court, 1911, as follows:

In the Circuit Court of Ralls County, Missouri, November Term, 1911.

WILLIAM J. MCWHIRT, Plaintiff,
vs.
THE CHICAGO & ALTON RAILROAD COMPANY et al., Defendants.

Motion in Arrest of Judgment.

Now come defendants, and each of them, and move the court to set aside and arrest the judgment heretofore rendered in this cause, for the following reasons, to-wit:

1. The plaintiff's petition does not state a cause of action against defendants, or either of them.

2. Plaintiff's petition does not state a joint cause of action against defendants.

3. The verdict and judgment herein are contrary to law; and not in proper form and substance as required by law.

4. Because the judgment should have been in favor of the defendants, and each of them, and against the plaintiff herein, on the whole record.

5. This court is without jurisdiction to enter judgment against

defendants in this cause by reason of this suit having been heretofore duly and properly removed to the United States Circuit Court for the Eastern Division of the Eastern District of Missouri on
78 the petition for removal of defendant, The Chicago & Alton Railroad Company.

6. Because there is a misjoinder of parties defendant.

Wherefore defendants pray the judgment of the court.

J. O. ALLISON AND
SCARRITT, SCARRITT, JONES & MILLER,
Attorneys for Defendants.

Which motion in arrest of judgment the court overruled on the 22nd day of December, 1911, at the same term of court. To which ruling of the court defendants then and there at the time excepted and still except.

Whereupon on the 22nd day of December, 1911, and during the same term of court, the defendants file their application, duly verified by their affidavit, by their attorneys, for an appeal in this cause, which affidavit for appeal is as follows:

STATE OF MISSOURI,
County of Ralls, ss:

In the Circuit Court, Ralls County, Missouri, November Term, 1911.

WILLIAM J. MCWHIRT, Plaintiff,
vs.
THE CHICAGO & ALTON RAILROAD COMPANY, and the LOUISIANA & MISSOURI RIVER RAILROAD COMPANY, Defendants.

Affidavit for Appeal.

Now comes J. O. Allison and states upon his oath that he is attorney and agent for the above named defendants, and being duly sworn upon his oath says and states for and on behalf of both of the above named defendants, as their agent and attorney that
79 the appeal prayed for in the above entitled cause is not made for vexation or delay but because this affiant, and said defendants believe that the appellants are aggrieved by the judgment and decision of the court in the above entitled cause, and they therefore pray that an appeal be allowed them from said judgment and decision.

J. O. ALLISON.

Subscribed and sworn to before me this 22nd day of December, 1911.

BENTON B. MEGOWN, *Clerk.*

Which said application for an appeal on said date and during the same term of court is seen, heard and duly considered by the court, found to be in due form, and by the court sustained.

Thereupon the court by order entered of record gave time to defendants to file appeal bond and bill of exceptions herein, which were accordingly done in the time allowed by the court.

And that the above matters and things, rulings and exceptions may be made a part of the record, defendants tender this their bill of exceptions and prays that the same may be signed approved and sealed as such and ordered filed and made a part of the record of this cause which is accordingly done this 19th day of November, 1913.

WILLIAM T. RAGLAND,
Judge of the Tenth Judicial Circuit of Missouri.

Filed November 19th, 1913.

BENTON B. MEGOWN,
Clerk of Circuit Court Ralls Co., Mo.

80 *Stipulation.*

It is hereby stipulated and agreed between the parties hereto that the exhibits introduced in evidence in this case by either side other than written or printed documentary exhibits, may be deposited with the clerk of the Supreme Court and need not be embodied in or attached to the printed transcript of the record herein.

E. S. GANTT,
Attorney for Plaintiff.
SCARRITT, SCARRITT, JONES & MILLER,
Attorneys for Defendants.

81 In the Supreme Court of the United States.

THE CHICAGO & ALTON RAILROAD COMPANY et al., Plaintiffs in Error.
vs.
WILLIAM J. MCWHIRT, Defendant in Error.

Order Extending Time for Filing Record.

For good cause shown, and it appearing to the undersigned, the Chief Justice of the Supreme Court of Missouri, who signed the citation upon Writ of Error in the above cause, that the clerk of this court will be unable to complete and file the record before the return day of the citation herein by reason of certain papers having been delayed or lost in transmission through the mails,

Now therefore, the time for plaintiff in error to docket this cause and file the record thereof with the Clerk of the Supreme Court of the United States is hereby enlarged and extended for thirty days, to wit, until on or before September 18, 1916.

W. W. GRAVES,
Acting Chief Justice of Supreme Court of Missouri.

STATE OF MISSOURI, *sct:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and correct transcript of all matters and proceedings called for in the præcipe filed by the said Plaintiffs in Error herein, in the case of The Chicago & Alton Railway Co., et al., v. William J. McWhirt, as fully as the same appear of record or on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of the State of Missouri, at my office in the City of Jefferson, State aforesaid, this 8th day of Sept., 1916.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk of the Supreme Court of Missouri.

Endorsed on cover: File No. 25,544. Missouri Supreme Court. Term No. 714. The Chicago and Alton Railroad Company and Louisiana & Missouri River Railroad Company, plaintiffs in error, vs. William J. McWhirt. Filed October 9th, 1916. File No. 25,544.

No. 714.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

THE CHICAGO & ALTON RAILROAD COMPANY AND LOUISIANA & MISSOURI RIVER RAILROAD COMPANY, PLAINTIFFS IN ERROR,

VS.

WILLIAM J. McWHIRT, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF FOR PLAINTIFFS IN ERROR.

WILLIAM C. SCARRITT,
ELLIOTT H. JONES,
CHARLES M. MILLER,
ALFRED M. SEDDON,
EDWARD S. NORTH,
Attorneys for Plaintiffs in Error.

E. L. SCARRITT,
Of Counsel.

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VS.

WILLIAM J. McWHIRT, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF FOR PLAINTIFFS IN ERROR.

In the brief for plaintiffs in error "in opposition to motion to dismiss or affirm" there is a full statement of the facts of this case, material to the issues here, as well as a brief on some points upon the merits of the case. We beg, therefore, to refer the court to said brief of plaintiffs in error for the statement, authorities and argument therein, and ask to file this as a supplemental brief and argument for plaintiffs in error, upon the merits.

I.

The Railroad Charter is a Contract.

The amended charter of 1870 of the Louisiana & Missouri River Railroad Company (Laws of Mo. 1870, pp. 93-103) constitutes a contract between this company and the State. Sec. 45 of this Act requires that the same be formally accepted by the company by vote of the directors. This was done (Printed Record p. 41, side page 66). In the case of *Pearsall* v. *Railway Co.*, 73 Fed. 933, Sanborn, J., for the court, says:

"If there is any principle of jurisprudence that is beyond dispute and discussion in this Nation, it is this: An accepted act of incorporation of a private corporation is a contract between the State and the corporation" (Citing numerous cases).

In the case of *New Jersey* v. *Yard*, 95 U. S. 104, emphasis is placed upon the fact that the Legislature requires the act of incorporation to be formally accepted.

There was abundant consideration to the State in amending the original charter of this company after the adoption of the Constitution of 1865. Not only was the route of the main line of the railroad changed but a branch line, to be known as the "South Branch" was provided for. This is the branch that runs from Mexico, Missouri, to Jefferson City, the Capitol City of the State. It doubtless was deemed by the Legislators a very material advantage to have the Capitol made accessible from the territory through which this branch runs. Also, among other considerations, this railroad company, in its amended charter of 1870, yielded up and waived an exemption, formally granted it, from the force of general laws in reference to "regulations, rates and charges" of railroads, for a term of ten years.

II.

Sec. 3078, R. S. Mo. 1909, Impairs this Charter.

Sec. 43 of the amended charter of 1870 of the Louisiana & Missouri River Railroad Company gives to this company the express power to lease its railroad to "any railroad company, upon such terms as may be mutually agreed upon by the respective parties." This was, indeed, a valuable right and power. The fact is, and the lease so shows, that it was through the leasing of its railroad that this company was enabled to complete the construction of this road and the construction of the branch line above mentioned. The charter gave to this company a free rein in making a lease. By virtue of this charter right, this company was empowered to lease its road to another railroad company without remaining liable for any act or conduct of its lessee in the management or operation of the road.

Moorshead v. *Railways Co.*, 203 Mo. 121.

It did lease its road to the Chicago & Alton Railroad Company upon such terms (Printed Record, p. 39, side p. 64).

Sec. 3078, R. S. Mo. 1909, as interpreted by the Missouri courts, renders the Louisiana & Missouri River Railroad Company, as lessor, liable not only for its duties to the public as a common carrier, but also for injuries caused by the negligent acts of the servants of the lessee company, as in the case at bar. Indeed, the Missouri Supreme Court has gone so far as to hold this company liable, under said Sec. 3078, to an employee of the lessee company for damages growing out of the breach of a contractual duty of the employer to an employee of the lessee company.

Markey v. *Railroad Company,* 185 Mo. 348.

Sec. 3078, therefore, insofar as it provides that the lessor company "shall remain liable as if it operated the road itself," as interpreted and enforced by the courts of Missouri, places a greater and different burden upon this company than was imposed by its charter. Indeed, it places a greater burden than would have been incurred had the company leased its road without any authority at all from the State.

Yeates v. *Railroad Co.,* 137 Fed. 943, and cases cited.

If the Louisiana & Missouri River Railroad Co. had deemed said Sec. 3078 applicable to it, it doubtless would have felt compelled to retain, in any lease made by it, some control over the road, as respects its operation and management, the employment and dismissal of servants, etc., in order to protect its own liability. It is obvious that the insistence upon such a provision in a proposed lease might have seriously affected the company in securing a lessee, and might well have prevented the company from making a lease on favorable terms as to compensation, and in other respects. Said Section 3078 unquestionably impairs the contractual power of the corporation, as granted in its charter, and the right and power to contract is a property right.

The *degree* of the impairment by the State of a contract is not important. In *Murray* v. *Charleston,* 96 U. S. 432, it is said that, "a law which alters the terms of a contract, by imposing new conditions or dispensing with those expressed, is a law which impairs its obligation."

In the case of *U. S.* v. *City of Quincy,* 4 Wall. 535, the court, quoting with approval from another case, says:

"The objection to a law on the ground of its impairing the obligation of a contract can never depend upon the extent of the

change which the law effects in its. Any deviation from its terms by postponing or accelerating the period of performance which it prescribed, imposing conditions not expressed in the contract, or dispensing with those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation."

In his opinion in the Dartmouth College case, 4 Wheat. 514, Washington, J., says:

"In short, does not every alteration of a contract, however unimportant, even though it be manifestly for the interests of the parties to it, impair its obligation. If the assent of all parties to be bound by a contract be of its essence, how is it possible that a new contract, substituted for, or engrafted on another, without such assent, should not violate the old charter?"

III.

The State Had Not Reserved the Right to Alter This Charter, at Will.

The question here resolves itself into this; is the Constitution of Missouri of 1865 read into the amended charter of 1870, of the Louisiana & Missouri River Railroad Co. as to become a part of it? If so, does Sec. 4 of Art. 8 of the Constitution of 1865, *in express terms,* reserve to the State the right to alter or amend at will the amended charter of 1870? We say not, because (1) in the original charter of this company it is provided that "this act *and the company hereby incorporated,*" are exempt from alteration and amendment at the discretion of the legislature. This language evinces a clear intention of the legislature to make a contract with this company that any charter rights given to it, at any time, should not be subject to alteration or amendment by the State at will, (2) because Sec. 4, of Art. 8 of the Constitution of 1865, on its face has reference solely to acts *creating* new corporations, and has no reference to acts thereafter passed amending charters of corporations already in existence. Not only is this apparent upon the face of the Constitution, but it has been so held by the Supreme Court of Missouri. *State ex rel.* v. *Railroad,* 48 Mo. 468; *St. Joseph, etc.* v. *Shambaugh,* 106 L. Ed. 569. To the same effect is the case of *County of Calloway* v. *Foster,* 93 U. S. 570, as which concerns the very charter now under consideration.

This court has expressly decided in the case of *New Jersey* v. *Yard*, 95 U. S. 104, that where a charter is granted and thereafter a general law is passed providing that charters "hereafter granted" shall be subject to amendment, and after that, a supplement is granted to the original charter, this supplemental charter does not come within the terms of such general law and is not subject to alteration at the will of the legislature. In that case a charter was granted to the Morris and Essex Railroad Company in 1835. In 1846 a general law was enacted providing that "the charter of every corporation which shall hereafter be granted by the legislature shall be subject to alteration, suspension or repeal in the discretion of the legislature." In 1865 a supplement was granted to the charter of 1835. It was held that the supplemental charter of 1865 was not subject to the provisions of said law of 1846. In this case the court also decides that the asserted right to alter or impair a charter will not be recognized unless it is so provided in express language; that such a right should not be allowed by implication. In the opinion in that case the court, speaking of the terms in which the right to alter a charter is reserved say:

"It is not easy to see why such a provision should be extended beyond the terms in which it is expressed; and all the force which properly belongs to it is given, when the exemption from the constitutional provision against impairing the obligation of contracts is extended as far as the language of the exemption justifies; *and it should be extended no further by implication.* * * * Section 6 of the General Act of 1846, is by its terms limited to charters of corporations granted after its passage; and it requires a very strong implication to make it applicable to amendments to charters in existence before its passage, though the amendments were executed subsequently" (Italics are ours).

The distinction between the power to alter a charter expressly reserved, and the power claimed by implication, is recognized in the case of *Citizens Savings Bank* v. *Owensboro*, 173 U. S. 649, wherein Mr. Justice White, for the court, says:

"It was upon the distinction existing between the implication of the power to amend, alter, or repeal, and its express statement in a contract that the case of *New Jersey* v. *Yard*, 95 U. S. 104, proceeded * * *."

It appears to be sound reasoning that a right to alter or impair a contract should not be permitted to be reserved by mere implication, and that every doubt as to the existence of such a reserved

right should be resolved against the State. For such reservation amounts to an exemption from the constitutional provisions against the impairing of the obligations of a contract. It is against natural right and justice that a contract should be a one-sided affair, binding one party forever and the other only so long as he does not desire to change it. The claim that a contract is so one-sided should not be allowed by a court unless it is compelled so to do by the express and unambiguous terms of the contract.

Sec. 4 of Art. 8 of the Constitution of Missouri, 1865, wherein it is attempted to be found the reserved right of the State to alter or impair the charter of the Louisiana & Missouri River Railroad Company, of 1870, is as follows: "Corporations may be formed under the general laws but shall not be *created* by special acts, except for municipal purposes. All general laws and special acts *passed pursuant to this section* may be altered, amended or repealed."

Obviously, this means that all "general laws" thereafter enacted with reference to private corporations might be altered or amended, and that all "special acts" concerning corporations "for municipal purposes" may thereafter be altered, amended or repealed. It cannot have reference to "special acts" thereafter passed creating *private* corporations, because *special acts* creating private corporations are prohibited. And its terms do not include special acts amending then existing charters of private corporations. *State ex rel.* v. *Rd.*, 48 Mo. 468. The amended charter, in question, of 1870, is a special act concerning a private corporation. It could not, therefore, have been "passed pursuant to this section" of the Constitution. It is only by the strongest sort of *implication* that it can be said that the state reserved, by this section of the Constitution, the right to alter or impair the Special Act of 1870, amending the charter of this railroad company. And we have noted, above, that resort may not be had to mere implication to find the power in the state to alter a contract. If it had been intended to reserve, in this constitution, the right to alter or amend, at will, any special act, thereafter passed, granting a new right to an old corporation, such could easily have been done in plain language.

As no legislative or constitutional provision, other than said Sec. 4 of Art. 8 of the Constitution of 1865, can be pointed out as reserving the power to the State to alter or impair, at will, this company's charter of 1870, we submit that Sec. 3078, R. S. Mo. 1909,

may not be made applicable to this company so as to hold it liable for the negligent act of a servant of its lessee. The following observation made by this court in the opinion in the case of *Murray* v. *Charleston*, 90 U. S. 762, is appropriate here:

"There is no more important provision in the Federal Constitution than the one which prohibits States from passing laws impairing the obligation of contracts, and it is one of the highest duties of this court to take care that the prohibition shall neither be evaded nor frittered away. Complete effect must be given to it in all its spirit. The inviolability of contracts, and the duty of performing them, as made, are foundations of all well ordered society and to prevent the removal or disturbance of these foundations was one of the great objects for which the Constitution was framed."

(c) If it should be held that the Constitution of 1865 gave to the legislature the power to amend the charter of 1870, in question, at will, it would not necessarily follow that Section 3078, R. S. Mo. 1909, must be deemed to have been intended by the legislature as an amendment to said charter. At the time that said law was enacted, March 24th, 1870 (Laws of Mo., 1870, pp. 89-91), there was in force and effect the following general law:

"No charter of any corporation, granted by the Legislature of this State, shall be altered, suspended or repealed by such Legislature, unless proof be made satisfactorily to the Legislature that notice of such proposed alteration, suspension or repeal has been given to the president and secretary of such corporation, for at least one month before the time at which such alteration, suspension or repeal will be proposed."

That was a lawful enactment, for the Constitution of 1865 did not prohibit the Legislature from naming reasonable conditions or restrictions upon the manner in which it would alter or amend corporate charters.

The enactment of the Legislature, last quoted, must be read, in *pari materia* with said Act of March 24th, 1870 (Now Sec. 3078, R. S. Mo. 1909).

As it cannot be claimed that any notice was given to the Louisiana & Missouri River Railroad Company that said Act of March 24th, 1870 (Sec. 3078, R. S. Mo. 1909), was proposed to be passed as an amendment to that company's charter, it must be deemed that it was not the intention of the Legislature, in enacting said Section 3078, to thereby alter or amend the charter of this corporation.

This would be in harmony with the view that under a reasonable construction of said Section 3078, it means that, if any railroad corporation of this state leases its road, *by virtue of the power granted in this section,* then such lessor shall remain liable as if it operated the road itself. Such a prospective interpretation of the statute would not affect the Louisiana & Missouri River Railroad Company, since this road did not lease its road by virtue of the power granted in said Section 3078, but by virtue of the power previously granted to it in its charter. It got no power or benefit from this statute, why should it be charged with its burdens?

IV.

The State Court was Without Jurisdiction of This Case by Reason of Its Removal to the Federal Court.

If our contention is correct that Sec. 3078, R. S. Mo. 1909, may not be applied to defendant, Louisiana & Missouri River Railroad Company, so as to hold it liable for the negligent act of the servant of its lessee, the Chicago & Alton Railroad Company, then plaintiff McWhirt did not state, in his petition, or make any case against said defendant Louisiana & Missouri River Railroad Company. Doubtless it will be conceded on the part of defendant in error that he does not pretend to have or state any case against the Louisiana & Missouri River Railroad Co., except under and by virtue of said Section 3078, R. S. Mo. 1909. If said Section 3078 is unconstitutional as to said railroad company the matter stands just as if said section was not found in the statutes, and if plaintiff McWhirt did not and could not state any case against the Louisiana & Missouri River Railroad Company, his case was single against and his controversy solely with the other defendant, The Chicago & Alton Railroad Company. As it appears that plaintiff was a resident and citizen of the State of Missouri, and of the district in which the suit was brought, and the Chicago & Alton Railroad Company was a corporation and citizen of the State of Illinois, the proper diversity of citizenship existed to present a case removable to the Federal Court. Accordingly, in due time, said Chicago & Alton Railroad Company filed herein its petition for the removal of this cause to the proper Federal Court, making the necessary allegations as to diversity of citizenship, amount involved, etc. It was further shown and set forth in said petition for removal (Printed Record,

pp. 33-35) that plaintiff McWhirt did not and could not have any cause of action against the Louisiana & Missouri River Railroad Company by reason of its charter, and that the controversy in this case was solely and singly between McWhirt and the Chicago & Alton Railroad Company. There was presented with said petition a bond for removal, which was duly approved by the State Circuit Court (Printed Record p. 36).

Notwithstanding said petition and bond for removal the State court refused to relinquish its jurisdiction over the case and ordered the same to trial. Thereupon said defendant Chicago & Alton Railroad Company preserved its objection to the action of the State court in still asserting jurisdiction of the case by filing its bill of exceptions in due form (Printed Record p. 36, side page 58).

Thereafter the Chicago & Alton, in its answer herein, asserted "That this cause has duly and legally been removed according to law to the United States Circuit Court for the Eastern Division of the Eastern District at St. Louis and that this (State) court has no jurisdiction to proceed further herein" (Printed Record p. 36, side p. 59).

This claim was further asserted in the trial court by the Chicago & Alton in paragraph 18 of its motion for new trial (Printed Record p. 44, side p. 72). And this claim was further asserted in and presented to the Supreme Court of Missouri in this case, but in that court, as well as in the trial court this claim of the Chicago & Alton Railroad Company, under the laws of the United States, was denied it. This federal question is raised in this court by assignment of error No. 7 (Printed Record p. 12).

(a) The action of the state trial court in retaining jurisdiction of this case, and proceeding to judgment therein, after the filing of the petition and bond for removal to the Federal Court is reviewable here.

In the case of *Mo. Pac. Ry. Co.* v. *Fitzgerald*, 160 U. S. 556, the court say:

"If a state court proceeds to judgment in a cause notwithstanding an application for removal its ruling in retaining the case will be reviewable here after final judgment under U. S. Rev. Stat. Sec. 709."

In the case of *Stone* v. *South Carolina*, 117 U. S. 430, the court say:

"If the state court proceeds after a petition for removal it does so at the risk of having its final judgment reversed if the record on its face shows that when the petition was filed that court ought to have given up its jurisdiction."

In the case of *Natl. Steamship Co.* v. *Tugman*, 106 U. S. 118, the court say:

"Upon the filing, therefore, of the petition and bond, the suit being removable under the statute—the jurisdiction of the State Court absolutely ceased, and that of the Circuit Court of the United States immediately attached. The duty of the State Court was to proceed no further in the cause. Every order thereafter made in that court was *coram no judice*, unless its jurisdiction was actually restored. It could not be restored by the mere failure of the company to file a transcript of the record in the Circuit Court of the United States within the time prescribed by the statute. The jurisdiction of the latter court attached, in advance of the filing of the transcript from the moment it became the duty of the State Court to accept the bond and proceed no further; and whether the Circuit Court of the United States should retain jurisdiction, or dismiss or remand the action because of the failure to file the necessary transcript, was for it, not the State Court, to determine."

(b) If, as we contend, defendant La. & Mo. R. R. Co. is not liable in this case, by virtue of Sec. 3078, R. S. Mo. 1909, on which the action against it is based, then, the petition of plaintiff states a cause of action solely against defendant, The Chicago & Alton Railroad Company.

Curtis v. *Railroad*, 140 Fed. 777.
C. R. I. & P. Ry. Co. v. *Stepp*, 151 Fed. 908.

In the first case cited the second syllabus, fully supported by the opinion, is as follows:

"The declaration, in an action in a state court by an employe of a railroad company which is a citizen of another state, operating a railroad under a lease from a local company, against both lessor and lessee, to recover for personal injuries alleged to have resulted solely from the negligence of the lessee in operating a train with improper and defective equipment, does not state a joint cause of action against the defendants, but a single cause of action against the lessee alone, and the action is removable by such defendant."

In the Stepp case, *supra*, the second syllabus, fully supported by the opinion, is as follows:

"Where the petition against a railroad company and an individual for death of an employe of the company and the petition of the company for removal of the cause show that the individual defendant, a resident of the state, is a mere employe of the company, against whom no recovery can be had under the statute on which the action is based, so that there is no joint liability, the mere subsequent allegation in plaintiff's petition that 'defendants' negligently did certain things, is ineffective to prevent the company, a non-resident, from removing the cause to the federal court."

If McWhirt made no case in his petition, against the La. & Mo. River R. Co., it follows that the cause was removable, and was duly removed, by the Chicago & Alton Railroad Company, to the federal court, and the state court was without jurisdiction to render judgment herein against the latter company.

(c) **Separable Controversy.** Even though it should be ruled that plaintiff, McWhirt, had a case against defendant, Louisiana & Missouri River Railroad Company, under the statute, still we contend that this case was removable to the Federal Court and was properly removed by the defendant, The Chicago & Alton Railroad Company, on the ground that there was a separable controversy as between plaintiff and the *lessor* company and plaintiff and the *lessee* company. In the petition for removal, filed herein, it is asserted that:

"Your petitioner further avers that if the said Louisiana & Missouri River Railroad Company is liable or responsible by virtue of the matters complained of in plaintiff's petition (which your petitioner expressly denies) then the controversy is still a controversy between citizens of different states, in this, that the controversy as between the plaintiff and your petitioner is a separate, separable and distinct controversy and different cause of action, if any, from the controversy and cause of action, if any, between the plaintiff and the Louisiana & Missouri River Railroad Company, as is disclosed by plaintiff's petition in this case, and the substance of what plaintiff claims in his petition as heretofore set out in this petition for removal (Printed Record p. 35).

The petition for removal was verified and therefore all statements of fact therein, in determining the question of removal must be taken as true.

Carlisle v. *Tel. Co.*, 116 Fed. 896.
Kelly v. *Railway Co.*, 122 Fed. 286.
Clarkhuff v. *Railroad*, 26 Fed. 465.

That there is a separable controversy in a case, like this, against a lessor company and a lessee company has been directly ruled.

Kelly v. *Railway Co.*, 122 Fed. 286.
Yeates v. *Railroad Co.*, 124 Fed. 796.
Spangler v. *Railroad Co.*, 42 Fed. 305, 307.

In the Kelly case, first above cited, the fourth syllabus, fully supported by the opinion, is as follows:

"*Removal of Causes—Diversity of Citizenship—Separable Controversy.* Rev. St. Mo. 1899, §1060, which provides that a railroad company of that state leasing its road to a corporation of another state, under any running arrangement, to run engines and cars upon its road in the state, shall remain liable, as if it operated the road itself, and that the lessee shall also be liable for its own acts, does not create a joint liability in tort; and an action against the lessor and lessee based on an alleged act of negligence of the lessee presents a separable controversy, and is removable by the lessee where the plaintiff is a citizen of the state."

In the Spangler case, *supra*, the court say:

"As to the second ground of the motion to remand, it is to be observed that the action is for a tort against two railroad companies, —one the lessor, the other the lessee. It may be conceded to plaintiff's contention that the other defendant, the lessor, could not escape its liability for the injury and damage by letting its road to another. It may also be conceded that both are liable. But the action is joint as well as several. The plaintiff had the right to proceed against either one of them, and would be entitled in the joint action to take judgment against one, and dismiss as to the other. In such a case the action is removable by the non-resident defendant. *Green* v. *Klinger*, 10 Fed. Rep. 689; *Clark* v. *Railway Co.* 11 Fed. Rep. 355; *Kerling* v. *Cotzhausen*, 16 Fed. Rep. 705; *Boyd* v. *Gill*, 19 Fed. Rep. 145; *Sharp* v. *Whiteside*, Id. 150; *Stanbrough* v. *Cook*, 38 Fed. Rep. 369."

Upon the record, the judgment herein should be reversed as to both defendants, plaintiffs in error here.

Respectfully submitted,

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ADDENDUM.

V.

Equal Protection of the Law.

Plaintiff in error, Louisiana & Missouri River Railroad Company, contends that the State of Missouri, by said Sec. 3078, R. S. Mo. 1909, denies to it the equal protection of its law, contrary to the Fourteenth Amendment to the Constitution of the United States. (Assignments of Error No. I and No. V.)

Section 3078, R. S. Mo. 1909, provides that

"Any railroad company organized in pursuance of the laws of this or any state * * * may lease * * * all or any part of a railroad with all its privileges, rights, franchises, real estate and other property, the whole or a part of which is in this state * * * upon such terms as may be agreed upon between said companies respectively * * * provided further that * * * a corporation in this state leasing its road to a corporation of another state * * * shall remain liable as if it operated the road itself."

Thus, a railroad corporation of another state, having a railroad in this state and enjoying a railroad franchise from this state, may lease its road to any other railroad company, without condition or hindrance and without remaining liable for the acts of its lessee. While, if a railroad company of this state leases its road to a corporation of another state the former is, by this statute, held liable for the acts of its lessee, which includes a liability, as this statute is interpreted and enforced by the courts of Missouri, for the torts and contractual obligations of the lessee. Thus a railroad corporation of this state is denied the equal benefit and protection of the law of this state as compared to foreign railroad corporations owning railroads in this state and identically situated, except as to place of incorporation.

If it be suggested that corporations of this state enjoying franchises to conduct public utilities constitute a proper class for the purposes of legislation, in order that the state may have direct and positive control over its corporations and the utilities they conduct, the answer is that any reason for the state retaining such control of a railroad company would apply to Missouri corporations conducting other public utilities in this state. But the state law does

not provide that if a water company, a gas company, a light company or a street railroad company of this state leases its plant or road and franchise to a corporation of another state the lessor shall remain liable for the torts of the lessee company, as if it still continued to operate the utility. It has been expressly held that a corporation owning and operating a street railroad ~~corporation~~ of this state may lease its road without remaining liable for the acts of its lessee.

Moorshead v. *Railroad*, 203 Mo. 121.
Hahs v. *Railroad*, 147 Mo. App. 262.

Thus a steam railroad corporation of this state is denied the equal protection and benefit of the law of this state not only as compared with other steam railroad corporations in this state, but as compared with all other public utility corporations of this state.

It is quite apparent that the real and only purpose of that clause of said Sec. 3078, which provides that a Missouri railroad corporation, which leases its road to a corporation of another state, shall remain liable as if it operated the road itself, was to prevent the removal to the Federal Court of damage suits, like the case at bar, for torts committed by a railroad company which is a citizen of another state.

We submit that such is not a legitimate purpose so as to render this special, class legislation constitutional and valid.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

CHICAGO & ALTON RAILROAD COMPANY and MISSOURI & LOUISIANA RIVER RAILROAD COMPANY, *Plaintiffs in Error,* vs. WILLIAM J. McWHIRT, *Defendant in Error.*	No. 714.

Error to the Supreme Court of the State of Missouri.

MOTION TO DISMISS OR AFFIRM.

Now comes the defendant in error, William J. McWhirt, and moves the Court in the alternative either to dismiss the writ of error herein or to affirm the judgment of the State Court for the following reasons, to-wit:

First. The decision of the Supreme Court of the

State of Missouri is not such as is reviewable by this Court, according to the terms of Section 237 of the Judicial Code of the United States.

Second. The judgment and decision of the Supreme Court of the State of Missouri is obviously correct, and it is manifest this writ of error was taken for delay only, and the questions upon which the decision of this case depends have already been determined by many decisions of this Court, and the questions upon which the decision of this case depends in this Court, upon this writ of error, are so frivolous as not to need further argument.

Third. The Supreme Court of Missouri, construing the laws of Missouri, has held that the charter of the defendant company was granted to the defendant and taken by it subject to the right of the State to change, alter or amend said charter, and such decision involves a question of general law and in no wise involves the construction or application of the Federal Constitution. The decision of the State Court rests upon non-Federal grounds broad enough to support the judgment of said court.

Fourth. This Court, in the case of Chicago & Alton Railroad Company v. Tranbarger, 238 U. S. 67, has decided that the charter of the Louisiana & Missouri River Railroad Company (plaintiff in error herein), granted in the year 1870, does not preclude the State from subsequently passing legislation imposing addi-

tional burdens upon the corporation, and that case is decisive of the issue here, settling the constitutional question finally against the contentions of the plaintiffs in error.

Wherefore, defendant in error prays the Court to either dismiss the writ of error or to affirm the judgment of the State Court, and he submits herewith brief and argument in support of this motion.

Thomas T. Gunderson,
Patrick Henry Kelly,
Charles M. Hay,
Attorneys for Defendant in Error.

St. Louis, Missouri, November .., 1916.

STATEMENT.

This is a suit for personal injury alleged to have been received from the negligent operation of the engine and cars of the defendant Chicago & Alton Railroad Company, an Illinois corporation, operating a railroad through the City of Vandalia, in this State, as the lessee of the Louisiana & Missouri River Railroad Company, a Missouri corporation, which is sued by reason of its alleged liability as lessor.

In the trial court judgment was entered for the plaintiff, and this judgment was affirmed by the Supreme Court of Missouri at its April Term, 1916. Plaintiffs in error bring this suit here by writ of error from the Supreme Court of the State of Missouri.

The alleged Federal question here presented grows out of the following state of facts:

The Louisiana & Missouri River Railroad Company was chartered by the Legislature of Missouri in 1859, and the act creating it expressly excepted the corporation from the provisions of Section 7, Article I, of the General Chapter on Corporations, Revised Statutes of Missouri 1855, page 371, which section reserved the right to alter and amend corporate charters. By an act of the Missouri Legislature, approved by the Governor and accepted by the Louisiana & Missouri River Railroad Company, January 19, 1870, and which took effect March 20, 1870, the company was given the right

to lease its road on such terms as it could secure. On March 24, 1870, the Legislature passed an act declaring that any railroad that should lease its right-of-way to another corporation should be and remain liable for the acts of the lessee company. This was formerly Section 1060, Revised Statutes of Missouri 1899, and now Section 3078, Revised Statutes of Missouri 1909. The material part of said act so creating liability is as follows:

> "* * * a corporation in this State leasing its road to a corporation of another State, or licensing or permitting a corporation of another State, under any running arrangement, to run engines and cars upon its road in this State, shall remain liable as if it operated the road itself."

As we understand, counsel for plaintiffs in error claim that Section 3078, Revised Statutes of Missouri 1909, is repugnant to the Constitution of the United States for the reason that it was passed four days after the act was passed amending the charter of the railroad company, the theory being that the railroad company acquired certain contract rights by virtue of its charter which the State could not affect by subsequent legislation without violating the Federal Constitution. Defendant in error contends that said assertion is unsubstantial and frivolous because by the State Constitution, 1865, the State reserved the right to amend the charter granted March 20, 1870, and for other reasons that will appear here in the following

BRIEF AND ARGUMENT.

In the case below, the Supreme Court of Missouri said:

> "For the fourth time the defendant corporations are in this court asking us to construe the lease dated August 1, 1870, by which the defendant, Louisiana & Missouri River Railroad Company, leased this railroad property to the predecessor of its co-defendant under the very circumstances out of which this suit has grown, and to declare the act of March 24, 1870, unconstitutional in so far as it attempts to make the lessor liable for the negligence of the lessee (Fleming v. Railroad, 263 Mo. 180; Brown v. Railroad, 256 Mo. 522; Markey v. Railroad, 185 Mo. 348). Long before the first of these cases came before us the most of the questions involved had necessarily been construed and determined in Smith v. Pacific R. R., 61 Mo. 17 (1875), and the last in the category which the ingenuity of appellants has suggested was expressly determined against them in the Fleming case. We are still satisfied with our decision in that case and hold that the Louisiana & Missouri River Company is liable with the Chicago & Alton Railroad Company in cases of this character."

Upon this ruling the alleged Federal constitutional question is based. The question presented may be thus stated: Is the Act of 1870 repugnant to the United States Constitution because it violates some con-

tractual right growing out of defendant's charter previously granted?

Clearly not.

The charter contract held by plaintiff in error was subject to alteration or amendment within the discretion of the Legislature of Missouri, as appears from the following:

The company was chartered by Act of the General Assembly in 1870.

Session Acts of Missouri, 1870, page 93.

The Constitution of 1865, then in force, contained the following provisions:

> "Corporations may be formed under general laws, but shall not be created **by special acts**, except for municipal purposes. All general laws **and special acts passed pursuant to this section may be altered, amended or repealed.**"
>
> Constitution 1865, Art. VIII, Sec. 4.

Article IV, Section 27:

> "* * * The General Assembly shall pass no special law for any case for which provision can be made by a general law; but shall pass general laws providing, so far as it may deem necessary, for the cases enumerated in this section, and for all other cases where a general law can be made applicable."
>
> Constitution 1865, Art. IV, Sec. 27.

The manifest purpose of the people of the State of Missouri was to obtain control of railroads and this is evidenced not only by the Constitution of 1865, but is still further accentuated by Section 21 of the Constitution of 1875, which is as follows:

> "Sec. 21. Railroad corporation, benefit of future legislation.—No railroad corporation in existence at the time of the adoption of this Constitution shall have the benefit of any future legislation, except on condition of complete acceptance of all the provisions of this Constitution applicable to railroads."

At the time the charter was granted, the following law was in force:

> "Section 47. The Legislature may, at any time, alter or amend this chapter, but such amendment shall not impair the rights of companies previously organized, or take away or impair any remedy given against such company, its stockholders or officers, for any liability which shall have been previously incurred.
>
> "Section 48. All existing railroad corporations within this State and such as may be hereafter chartered or formed shall respectively have and possess all the powers and privileges contained in this chapter, and they shall be subject to all duties, liabilities and provisions not inconsistent with the provisions of their charter herein contained."
>
> The Laws of 1865, Chap. 63, Secs. 47 and 48.

It is ancient law in Missouri that the charter granted to the defendant company was subject to the general law concerning corporations, which gave the Legislature power to alter, suspend or repeal all charters thereafter granted.

Pacific R. R. Co. v. Renshaw, 18 Mo. 210;
Pacific R. R. Co. v. Hughes, 22 Mo. 291;
Gregg v. Mining Co., 164 Mo. 616;
State v. Railroad, 242 Mo. 339.

The Supreme Court of Missouri, in Brown v. Railroad, 236 Mo., *l. c.* 533, in passing upon the constitutionality of this identical section of the Missouri statute, when assailed as impairing the obligation of the contract with this particular road, determined the issue here in this language:

"That said act, now Section 3078 of the Revision of 1909, is constitutional, has been adjudged against this particular defendant, when assailed by a different objection (Dean v. Railroad, 199 Mo. 386; Markey v. Railroad, 185 Mo. 348). That said act is not subject to the present objection will appear by the fact that since 1845 and continuously until the adoption of the Constitution of 1865, the Legislature reserved express power to itself to alter, suspend or repeal at its discretion the charters of all corporations (R. S. 1845, Chap. 34, Art. I, Sec. 7, p. 232; R. S. 1855, Chap. 34, Sec. 7, p. 371). And thereafter the Constitution of 1865 continued the same control over all corporations by providing that they should not be created by

special acts, and requiring them to be formed under general laws, with a proviso that all general and special acts passed pursuant to this section 'may be altered, amended or repealed', and authorizing the Legislature to pass general laws to effectuate these purposes (Constitution 1865, Art. VIII, Sec. 4; Constitution 1865, Art. IV, Sec. 27; State *ex inf.* v. Railroad, 151 Mo. 162; State *ex rel.* v. Corkins, 123 Mo. 56; State *ex rel.* v. Railroad, 48 Mo., *l. c.* 471).

"Under these words of the Constitution any act thereafter passed, original or amendatory, touching the charters of corporations, was subject in all respects to future legislative control, and a similar provision was inserted by the Legislature when it passed a general act relating to railroad corporations in 1855 (G. S. 1865, Chap. 63, Secs. 47, 48). These constitutional and legislative provisions were in full force at the time of the Act of 1870, which appellant claims amended its charter, and at a later day of the same session when the Legislature enacted the law which appellant insists took away the right given by the former act. It follows that if appellant's contention is correct in both respects, still the Legislature in so doing did not impair any contract between the State and said defendant; for it only did what it had full power to do under the Constitution and the law then existing."

Brown v. Railroad, 256 Mo., *l. c.* 533.

In Fleming v. Railroad, 263 Mo. 180, referred to and adopted by the Court in the opinion below, the

Supreme Court of Missouri covered the whole question and used this language:

> "The non-liability of the Louisiana & Missouri River Railroad Company is asserted to arise out of the fact that the company was chartered by the Legislature in 1859 by an act which expressly excepted the corporation from the provisions of Section 7 of Article I of the General Chapter on Corporations, Revised Statutes 1855, page 371, which section reserved the right to alter and amend corporate charters. On this ground the application to the company of the Act of March 24, 1870 (formerly Sec. 1060, R. S. 1899, and now Sec. 3078, R. S. 1909), is resisted. That act expressly provided and provides that a railroad company leasing its properties shall remain liable for damages resulting from the negligence of its lessee. The liability of the company has been previously affirmed by this Court (Brown v. Railroad, 256 Mo. 522; Dean v. Railroad, 199 Mo. 386; Markey v. Railroad, 185 Mo. 348) and the correctness of these decisions on the questions therein raised is not challenged, but it is said a new and controlling question is presented by the fact, now called to this Court's attention for the first time, that by an act approved by the Governor and accepted by the company, January 19, 1870, and which took effect, March 20, 1870, four days before what is now section 3078, Revised Statutes 1909, became law, the company was given the right to lease its road on such terms as it could secure, and that to construe section 3078 as qualifying this right would be to construe the section retrospectively and impair the

company's charter contract, thus violating designated constitutional provisions.

"Assuming that the Act of 1859 was unamendable without the company's assent, and that the Act of 1868, amending the former, was likewise, yet neither conferred upon the company any right to lease its road, that right being conferred for the first time by the Act of January 19, 1870. Prior to this enactment the Constitution of 1865 had been adopted and was in force, section 4, article VIII thereof, expressly providing that 'corporations may be formed under general laws, but shall not be created by special acts, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered, amended or repealed.'

"The policy of this section is clear enough; and while it may be conceded contract rights cannot lawfully be impaired, even by the adoption of constitutional provisions affecting them, yet it is true that the right to lease its road could not have been a part of the company's charter contract in any sense until 1870 (Dean v. Railroad, 199 Mo., *l. c.* 390; Thomas v. Railroad, 101 U. S., *l. c.* 84), and since this right to lease was a new, an additional and markedly different power, conferred by the Legislature in 1870, it was subject to any applicable constitutional provisions, which provisions would, of course, remain applicable despite any prior or subsequent legislation, whether found in amendments to the Missouri company's charter or elsewhere.

"The provision in the Act of 1870 (or in former

acts which it amended or consolidated), excepting the company from the section of the general law reserving to the Legislature the power to alter and amend the charter, can in no way impair the force of the constitutional section quoted. We think that section, announcing the general policy of the State, is applicable to that part of the Act of January, 1870, which conferred a new power, the right to lease, upon the company, and that it, by its own force, reserved to the State the right to alter and amend the new provisions of the former charter, added after the adoption of the Constitution of 1865, and forming no part of the charter of the company until 1870. Being no part of the original charter contract and being a power accepted after the adoption of the Constitution of 1865, the power to amend the Act of 1870, which conferred the new power was reserved by the constitutional section quoted, and that act was amended by the Act of March 24, 1870 (Sec. 3078, R. S. 1909), and that is the act now applicable and under it the company is clearly liable for damages resulting from the negligence of its lessee. The Missouri company was properly joined, the application to remove to the Federal Court was properly denied and the trial court had jurisdiction."

It follows, therefore, that the charter of plaintiff in error, granted in 1870, was and is governed by the provisions of the Constitution of 1865 and is therefore sub-

ject to amendment and alteration, any language of the charter act itself to the contrary notwithstanding.

Mo. Pac. Ry. Co. v. Kansas, 216 U. S. 262, *l. c.* 274;
Northern Central Ry. Co. v. Maryland, 187 U. S. 258, *l. c.* 267;
Yazoo & Miss. Valley Ry. Co. v. Adams, 180 U. S. 1.

It is elementary that where the Constitution of a state reserves the right to repeal, alter or amend, all charters granted by the Legislature are subject to such provision, and therefore are wanting in that attribute of irrevocability which is essential to bring them within the intendment of the clause of the Constitution of the United States protecting contracts from impairment.

Northern Cent. R. Co. v. Maryland, 187 U. S. 258, 267;
Citizens' Sav. Bank v. Owensboro, 173 U. S. 636;
Bienville Water Supply Co. v. Mobile, 186 U. S. 212, 222;
Railway Co. v. Philadelphia, 101 U. S. 528, 539;
Peik v. Chicago, Etc., R. Co., 94 U. S. 164;
Hamilton Gas Light, Etc., Co. v. Hamilton City, 146 U. S. 258, 270;
Yazoo, Etc., R. Co. v. Adams, 180 U. S. 1, 17;
San Antonio Traction Co. v. Altgelt, 200 U. S. 304, 308.

Where, at the time of the incorporation, a general

law of the state was in existence, which enacted that the charter of every corporation subsequently granted, and any renewal, amendment or modification thereof, should be subject to amendment, alteration or repeal by legislative authority, constitutes the condition upon which every charter of a corporation subsequently granted is held, and as operative and as much a part of the charter and amendment as if incorporated into them.

Tomlinson v. Jessup, 15 Wall. 454, 457;
Greenwood v. Freight Co., 105 U. S. 13;
Louisville Water Co. v. Clark, 143 U. S. 1, 14;
Railroad Co. v. Georgia, 98 U. S. 359, 365;
Hoge v. Railroad Co., 99 U. S. 348, 353;
Sinking Fund Cases, 99 U. S. 700, 720;
Close v. Glenwood Cemetery, 107 U. S. 466, 476;
Spring Valley Waterworks v. Schottler, 110 U. S. 347, 352;
Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 683, 696;
Sherman v. Smith, 1 Black 587;
Beer Co. v. Massachusetts, 97 U. S 25;
Freeport Water Co. v. Freeport City, 180 U. S. 587, 597.

Corporations are the creations of the state, endowed with such facilities as the state bestows and subject to such conditions as the state imposes, and if the power to modify their charters is reserved, that reservation is a part of the contract, and no change within the legit-

imate exercise of the power can be said to impair its obligation; and when the law applies to all alike, the equal protection of the law is not denied.

St. Louis, Etc., R. Co. v. Paul, 173 U. S. 404, 408;
Missouri Pac. R. Co. v. Mackey, 127 U. S. 205.

No question can arise as to the impairment of the obligation of a contract, when the company accepted all of its corporate powers subject to the statutory reserved power of the State to modify its charter and to impose additional burdens upon the enjoyment of its franchise, whether such reserved power is exercised by an act of the Legislature or by a constitutional amendment or re-enactment.

Sioux City St. R. Co. v. Sioux City, 138 U. S. 98, 108, reaffirmed in Union St. R. Co. v. Snow, 168 U. S. 706, 707;
Greenwood v. Freight Co., 105 U. S. 13;
Miller v. The State, 15 Wall. 478, 488;
Gibbs v. Consolidated Gas Co., 130 U. S. 396, 408;
Hamilton Gas Light, Etc., Co. v. Hamilton City, 146 U. S. 258, 270;
People v. Cook, 148 U. S. 397, 411;
U. S. v. Union Pac. R. Co., 160 U. S. 1, 37;
New York, Etc., R. Co. v. Bristol, 151 U. S. 556, 567;
Pennsylvania College Cases, 13 Wall. 190;
Louisville, Etc., R. Co. v. Kentucky, 61 U. S. 677, 692.

Such Legislation Has Been Held Constitutional as an Exercise of the Police Power.

In Chicago & Alton Railroad Company v. Tranbarger, 238 U. S. 67, this Court had under consideration the question of impairment of contract, under this identical charter, by reason of the subsequent passage of an act imposing additional burdens upon the corporation. This Court held that such question presented no violation of the Constitution of the United States, and, among other things, said:

> "But a more satisfactory answer to the argument under the contract clause, and one which at the same time refutes the contention of plaintiff in error under the due-process clause, is that the statute in question was passed under the police power of the State for the general benefit of the community at large and for the purpose of preventing unnecessary and widespread injury to property.
>
> "It is established by repeated decisions of this Court that neither of these provisions of the Federal Constitution has the effect of overriding the power of the State to establish all regulations reasonably necessary to secure the health, safety or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise (Atlantic Coast Line v. Goldsboro, 232 U. S. 548, 558, and cases cited). And it

is also settled that the police power embraces regulations designed to promote the public convenience or the general welfare and prosperity, as well as those in the interest of the public health, morals or safety (Lake Shore & Mich. Southern Ry. v. Ohio, 173 U. S. 285, 292; C., B. & Q. Ry. v. Drainage Commissioners, 200 U. S. 561, 592; Bacon v. Walker, 204 U. S. 311, 317)."

We therefore contend that under this authority, as well as the other authorities herein cited, there is no real or substantial Federal questions presented in this case, and therefore pray that the motion to dismiss or affirm be sustained.

Respectfully submitted,

Thomas B. Boundary,

Edwin Perry Curtis,

Charles M. Hay,

Attorneys for Defendant in Error.

St. Louis, Mo., November .., 1916.

No. 714.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

THE CHICAGO & ALTON RAILROAD COMPANY AND LOUISIANA & MISSOURI RIVER RAILROAD COMPANY, PLAINTIFFS IN ERROR,

VS.

WILLIAM J. McWHIRT, DEFENDANT IN ERROR.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

WILLIAM C. SCARRITT,
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CHARLES M. MILLER,
Attorneys for Plaintiffs in Error.

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STATEMENT.

William J. McWhirt sued the Chicago & Alton Railroad Company and the Louisiana & Missouri River Railroad Company, plaintiffs in error, in the Circuit Court of Audrain County, on December 17th, 1910, for personal injuries alleged to have been sustained by him "by reason of the carelessness and negligence of the said Chicago & Alton Railroad Company, its agents, servants and employees." The case was sent, upon change of venue, and tried in Ralls County, Missouri, where a verdict and judgment for $10,000 was rendered against both companies. It is not claimed that McWhirt received his injuries through any negligence of defendant, Louisiana & Missouri River Railroad Company, its agents, servants and employees, but that company was sought to be held

by plaintiff, and was held by the courts of Missouri, liable to plaintiff solely by reason of being lessor of the Chicago & Alton Railroad Company, as will hereinafter appear.

The petition alleges that the Louisiana & Missouri River Railroad Company is a corporation of Missouri, and is the owner of the railroad line where and upon which the accident in question occurred, and "did lease its said line of railroad and right of way to a corporation known as the Chicago & Alton Railroad Company, which said last named railroad company was at that time a corporation under the laws of Illinois, and operating a railroad in said state * * * said defendant, the Chicago & Alton Railroad Company, operates a line of railroad over the said line of railroad belonging to its co-defendant in the state of Missouri, and has so operated said line of railroad over said line in the counties of Audrain, Callaway and Pike for a period of two years and more prior to the filing of this petition, and was operating its said line of its co-defendant, The Louisiana & Missouri River Railroad Company, on or about the 11th day of May, 1910, and was so operating said railroad and running its cars and locomotives and passenger trains thereon, with the knowledge and consent of its said co-defendant, the Louisiana & Missouri River Railroad Company. * * * Plaintiff further states that by reason of the carelessness and negligence of the said Chicago & Alton Railroad Company, its agents, servants and employees aforesaid, he sustained the following described and permanent injuries. * * * Wherefore plaintiff says by reason of the premises and cause of action as accrued to him against these defendants, he has been damaged in the sum of $25,000.00, for which he prays judgment." (Printed Rec. pp. 29-32.)

During the progress of the trial it was admitted for the purpose of this case that the railroad right of way in Vandalia, Missouri, described in the evidence, where the accident occurred, was included in the lease from the Louisiana & Missouri River Railroad Company to Chicago & Alton Railroad Company, and that the latter company "was operating the railroad in question at the time of plaintiff's accident here in question" (Printed Rec. p. 40, Side page 66).

By plaintiff's given instruction No. 6 (Printed Rec. p. 41) the jury were requested to find that plaintiff's "said injury was caused by the negligence of the defendant, Chicago & Alton Railroad

Company, or its agents in charge of said cars," and were allowed to find judgment against defendant, Louisiana & Missouri River Railroad Company, by virtue of its being the owner of the railroad right of way and road bed and lessor thereof to its co-defendant, Chicago & Alton Railroad Company.

Plaintiff, McWhirt, received his injuries by being struck by one of the Chicago & Alton Railroad Company's cars on the night of May 11th, 1910, as he was crossing "D" street in Vandalia, Audrain County, Missouri.

Plaintiff in error, Louisiana & Missouri River Railroad Company, was incorporated by an act of the Legislature entitled "An Act to Incorporate the Louisiana & Missouri River Railroad Company," etc. (Laws of Missouri, 1859, p. 400). Thereafter acts, not important here, were passed, amending this original charter. In 1870 the laws relating to this company were consolidated in an act entitled "An Act to amend an act entitled 'An Act to amend an act to incorporate the Louisiana & Missouri River Railroad Company, approved March 24, 1868,' and to consolidate the various acts relating to said company." (Laws of Missouri, 1870, pp. 93-103).

Section 43 of the Act of 1870 granted to this company the express right to lease its railroad without imposing upon the lessor any condition, reservation, or liability for the negligent acts of the lessee. Section 43 of said Act is as follows:

"Sec. 43. It shall be lawful for said company, whenever the interests of said road or its branches may require it, to unite or consolidate the same, for running purposes, operation or business, with any railroad company, upon such terms as may be mutually agreed upon by the respective parties, and to contract with any such company for the running of trains over and use of their road, depots, buildings and all other appurtenances connected therewith, and may in like manner lease their said road, or any branch thereof, to any such railroad company for a period of years, and execute good and sufficient transfers of the same, with all property, machinery and appurtenances thereto belonging."

Section 45 of said Act provides:

"This act shall take effect and be in force from and after sixty days from its passage; provided, it shall within that time be accepted by a vote of the directors of said company."

It was admitted at the trial that such charter was accepted by resolution of that company within sixty days after the passage

of such act, to-wit, on January 19, 1870. (Printed Rec. 41, side page 66). This act was approved January 19, 1870, and took effect sixty days thereafter, that is, on March 20th, 1870.

Section 36 of said defendant's original charter, approved March 10th, 1859 (Laws of Missouri, 1859, pp. 400-7), and also Section 33 of the amended charter of 1870 (Laws of Missouri, 1870, p. 101), is as follows:

"This act, and the company hereby incorporated, are exempt from the seventh, thirteenth, fifteenth, sixteenth, seventeenth, eighteenth and nineteenth sections of the first article of the act concerning corporations, approved November 23, 1855."

Section 7 of article 1 of the act of November 23rd, 1855, referred to in and from which the charter is exempted, is as follows:

"Sec. 7. The charter of every corporation that shall hereafter be granted by the Legislature, shall be subject to alteration, suspension and repeal, in the discretion of the Legislature." (R. S. Mo. 1855, Chap. 34, Sec. 7, p. 371.)

That was the only law in force and effect at the time the original charter of the Louisiana & Missouri River Railroad Company was granted, which gave Legislature power to amend corporate charters at will. Therefore, by exempting this company and its charter from the force and effect of said Section 7 of article 1 of the act of November 23, 1855, the State contracted with this company that neither the company nor its charter should be altered, amended or repealed at "the discretion of the Legislature," that is, without the consent of the company.

Plaintiff, McWhirt, seeks to hold defendant, Louisiana & Missouri River Railroad Company liable to him for the alleged negligent acts of its lessee, the Chicago & Alton Railroad Company, solely by virtue of Section 3078, Rev. Stat. Mo., 1909 (Sec. 1060, R. S. Mo., 1899). The language of this statute, pertinent to this case, is thus:

"Any railroad company organized under and pursuant to the laws of this or any state and of the United States may lease or purchase all or any part of a railroad, with all its privileges, rights, franchises, real estate and other property, the whole or a part of which is in this state, and constructed, owned or leased by any other company, if the lines of the road or roads of such companies are continuous or connected at a point either within or without

this state, upon such terms as may be agreed upon between said companies respectively; * * * and a corporation in this state leasing its road to a corporation of another state, or licensing or permitting a corporation of another state under any running arrangement to run engines and cars upon its road in this state, shall remain liable as if it operated the road itself."

This section was first enacted and became a law on March 24th, 1870 (Laws of Mo., 1870, pp. 89, 91). That is, it became a law four days after the amended charter of said plaintiff in error became binding.

The contention of the plaintiffs in error is that the Act of January 19th, 1870, which amended the original charter of the La. & Mo. River R. Co. and which gave it the right to lease its railroad without imposing as a condition upon that right an obligation to be liable for all or any of the acts of negligence of the lessee was a contract between it and the state, which contract and the rights thereby conferred upon it were property; that the State of Missouri could not lawfully thereafter by a general law to which it did not consent, impose a liability upon it to pay the damage caused by the negligence of the lessee; that, therefore, Section 3078, R. S. Mo. 1909, is unconstitutional and void as to the plaintiff in error, Louisiana & Missouri River Railroad Company, in that it is an attempt to deprive plaintiff in error of its property without due process of law, by imposing obligations on it not embodied in and contrary to its charter, and that it impairs the obligation of the contract between the State and the said Company, as embodied in its charter, which provides that the Company may lease its road without remaining liable for the acts of its lessee in the operation of the road.

The question of the unconstitutionality of said Section 3078, R. S. Mo. 1909, is directly raised in the record before this court in this case, and, indeed, in the first pleading of this defendant.

That part of the separate answer of this defendant pertinent here is as follows:

"Further answering, defendant states that section 1060, Chapter 12, of Revised Statutes of Missouri of 1899, under which it is sought to hold this defendant liable in this action, is unconstitutional and void as to this defendant for the reason that defendant, Louisiana & Missouri River Railroad Company, was organized and created a corporation by an Act of the Legislature of the State of

Missouri, entitled as follows, * * * which Act duly and legally became a law on January 19, 1870, and prior to the amendment of said section 1060, Revised Statutes of Missouri of 1899, which said act incorporating this defendant grants to said company the right to lease its road or any branch thereof to any other railroad without any conditions or limitations whatsoever and without thereby assuming all or any liability for damage occasioned by the negligence of the lessee and to hold said section 1060, Revised Statutes of Missouri, 1899, as applicable to this company * * * would be contrary to and in violation of Section 10 of Article 2 of the Constitution of the United States which provides that 'no state shall * * * pass any bill of attainder, *ex post facto* law or law impairing the obligation of contracts,' and in violation of the Fourteenth Amendment of the Constitution of the United States, which requires that no state shall deprive any person of property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws" (Printed Rec. p. 37, side page 60).

Section 1060 R. S. 1899, referred to in the above answer is the same as Sec. 3078 R. S. 1909.

This question was again directly raised by an instruction requested by this defendant and by the court refused (Printed Rec. p. 42, side page 68). The question was again raised in the motion for new trial of this defendant, paragraph 20 (Printed Rec. p. 46, side page 75). It was further raised and pressed in the presentation of this case in the Supreme Court of Missouri and there, as in the trial court, the decision was against said defendant, plaintiff in error here, and in favor of the validity and constitutionality of said act (Printed Rec. p. 16, side page 24).

It was again raised in the Supreme Court of Missouri in the motion for rehearing (Printed Rec. 23, side page 36), and in the motion to transfer this case to the Supreme Court of Missouri, *en banc* (Printed Rec. p. 25).

This constitutional question is presented in this court by assignments of error herein I. to VI. (Printed Record, pp. 9-11).

SUGGESTIONS AGAINST MOTION TO DISMISS OR AFFIRM.

I.

This court has jurisdiction in this case. The validity of Sec. 3078 R. S. Mo. 1909, is drawn in question on the ground of it being repugnant to the Constitution of the United States and the decision of the Supreme Court of Missouri, the highest court of said State, was in favor of its validity. Sec. 709 U. S. R. S. confers jurisdiction on this court in such cases in this language:

"A final judgment or decree in any suit in the highest court of a State * * * where is drawn in question the validity of a statute or authority exercised under any statute on the ground of their being repugnant to the Constitution, Treaties or laws of the United States and the decision is in favor of their validity; * * * may be examined and reversed or affirmed in the Supreme Court upon writ of error."

The validity of the Act of March 24, 1870 (Sec. 3078, R. S. Mo. 1909), was expressly challenged on the ground of being repugnant to the Federal Constitution in the answer of defendant, Louisiana & Missouri River Railroad Company (Printed Rec. p. 37, side page 60); by instruction or declaration of law requested by said defendant (Printed Rec. p. 42, side page 68); in said defendant's motion for new trial, paragraph 20 (Printed Rec. p. 46, side page 75); and in the opinion in this case in the Supreme Court of Missouri, it is expressly stated that defendants, plaintiffs in error here, seek "to declare the Act of March 24th, 1870 (Sec. 3078 R. S. 1909), unconstitutional insofar as it attempts to make the lessor liable for the negligence of the lessee."

Our contention from the beginning to the end, in the State Courts, was that the statute (R. S. Mo. 1909, Sec. 3078), upon which this action is based against the La. & Mo. River R. Co., and especially the clause "shall remain liable as if it operated the railroad itself," was invalid as being in contravention of the defendant's rights under the Federal Constitution. The Supreme Court of Missouri enforces that declaration of the statute against our claim that it was invalid.

In fact, learned counsel for defendant in error do not, in their motion to dismiss or affirm and brief thereon, appear to question

but what a Federal question is raised on the face of this record. Rather their claim is that the constitutional question is "unsubstantial and frivolous" because, as they assert, the question has been several times decided against plaintiffs in error by the Supreme Court of Missouri.

We assume that it makes no difference whether this question has been decided against plaintiffs in error by the Supreme Court of Missouri but once, or a dozen times. The fact is, however, that the precise question, as raised upon the record in this case, has been but once presented to and decided by the Supreme Court of Missouri, prior to the case at bar.

In the case of *Flemming* v. *Railroad,* 263 Mo. 180, the court did decide the question here at issue against plaintiffs in error here, but as that case was decided in favor of defendants (the plaintiffs in error here) on another point, there was no occasion for bringing that case or the constitutional question therein before this court. This is the first case in which the record has been such and the decision of the Supreme Court of Missouri such that the question here at issue could be submitted to this court. If it were true that this question had been often and seriously considered and decided by the Supreme Court of Missouri that would be a strong argument against the assertion that the question is "unsubstantial and frivolous."

However, the decisions of the Supreme Court of Missouri are unimportant in determining whether or not the Louisiana & Missouri River Railroad Company has a contract with the State of Missouri, and if so, what that contract is, and in determining whether or not a statute of the state impairs the obligation of that contract. While it is stated by this court that, as a general rule, it will adopt the construction placed by the Supreme Court of the State upon the Constitution and laws of the State, an exception to that rule is just as well established, to-wit: when a question arises as to whether a contract exists as claimed and whether the State law complained of impairs its obligation, the decisions of the State Court are not controlling but this court will, for itself, decide those questions and in doing so will examine and adopt its own construction of the State laws.

Mobile & Ohio R. R. Co. v. *Tenn.,* 153 U. S. 486.
Scott v. *McNeal,* 154 U. S. 34.
McCullough v. *Commonwealth of Virginia,* 172 U. S. 104.

In *Mobile & Ohio Railroad Co.* v. *Tennessee,* 153 U. S. 486, 492, Mr. Justice Jackson, reviewing prior decisions, said: "It is well settled that the decision of a state court holding that, as a matter of construction, a particular charter or a charter provision does not constitute a contract, is not binding on this court. The question of the existence or non-existence of a contract in cases like the present is one which this court will determine for itself, the established rule being that where the judgment of the highest court of a state, by its terms or necessary operation, gives effect to some provisions of the state law which is claimed by the unsuccessful party to impair the contract set out and relief on, this court has jurisdiction to determine the question whether such a contract exists as claimed, and whether the state law complained of impairs its obligation."

In *Scott* v. *McNeal,* 154 U. S. 34, opinion by Mr. Justice Gray, it is said:

"Upon a writ of error to review the judgment of the highest court of a state upon the ground that the judgment was against a right claimed under the Constitution of the United States, this court is no more bound by that court's construction of a statute of the territory, or of the state, when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the state, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another state. In every such case, this court must decide for itself the true construction of the statute. *Hunnington* v. *Attrill,* 146 U. S. 657; *Mobile & Ohio R. Co.* v. *Tennessee, ante,* p. 793."

In *McCullough* v. *Commonwealth of Virginia,* 172 U. S. 102, in the opinion by Mr. Justice Brewer, it is said:

"It is insisted that whatever may be our own opinions upon the case, we are to take the construction placed by the court of appeals of Virginia upon the act as the law of that state. While it is undoubtedly the general rule of this court to accept the construction placed by the courts of a state upon its statutes and Constitution, yet one exception to this rule has always been recognized, and that in reference to the matter of contracts alleged to have been impaired. This was distinctly affirmed in *Jefferson Branch Bank* v. *Skelly* 1 Black, 436, 443, in which the court, speaking by Mr. Justice Wayne, gave these reasons for the exception: 'It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the Su-

preme Court of a state, whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of that clause of the Constitution of the United States which inhibits the states from passing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular state legislation, if this court could not decide independently of all adjudication by the Supreme Court of a state, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the Supreme Court of a state? It never was intended, and cannot be sustained by any course of reasoning, that this court should, or could with fidelity to the Constitution of the United States, follow the construction of the Supreme Court of a state in such a matter, when it entertained a different opinion.' The doctrine thus announced has been uniformly followed."

II.

Defendant in error, McWhirt, has no case against the Louisiana & Missouri River Railroad Company, unless Sec. 3078, R. S. Mo. 1909, is held to be valid as to and its terms applicable to said corporation. No claim is made that McWhirt received his injuries through any negligence of the La. & Mo. River Railroad Company, or that of its agents or employees. In the petition the charge is "plaintiff further states that by reason of the carelessness and negligence of the said Chicago & Alton Railroad Company, its agents, servants and employees aforesaid, he sustained the following described and permanent injuries" (Printed Rec. p. 32, side page 50). And it is further charged that the Louisiana & Missouri River Railroad Company, a corporation of Missouri, was the owner of the railroad right-of-way where the accident occurred and had leased the same to its co-defendant, Chicago & Alton Railroad Company, a corporation of Illinois. All of the evidence showed that the accident occurred through the negligence, if any, of the agents and servants of the Chicago & Alton Railroad Company alone. During the trial it was expressly admitted, for the purposes of this case, that the Chicago & Alton Railroad Company "was operating the railroad in question at the time of plaintiff's accident, here in question " (Printed Rec. p. 40, side page 66).

The theory of the liability of defendant Louisiana & Missouri River Railroad Company put forward by plaintiff (defendant in error here) and adopted by the Courts of Missouri was that said railroad company had no right to lease its railroad to another and thereby escape any liability that was incurred in the operation of the railroad.

It is well established law of Missouri that if a railroad company is given, by the state, authority to lease its road and such authority is given without any condition that the lessor remain liable, then the lessor company is not liable for the acts of the lessee, in the operation of the road.

Moorshead v. *Railways Co.*, 203 Mo. 121.
Hahs v. *Railroad*, 147 Mo. App. 262.
Chlanda v. *Transit Co.*, 213 Mo. 244.
Westerfelt v. *Transit Co.*, 222 Mo. 325.
Graefe v. *Transit Co.*, 224 Mo. 232.

In the case at bar the claim is that the Louisiana & Missouri River Railroad Company received its authority from the state to lease its road from said Sec. 3078, R. S. Mo. 1909, but that such authority was given on the condition that "a corporation in this state leasing its road to a corporation of another state * * * shall remain liable as if it operated the road itself."

In the case of *Markey* v. *Louisiana & Missouri River Railroad Company*, 185 Mo. l. c. 360, the court states this proposition thus:

"A railroad company has no authority to lease its road or abandon its management to another company, without permission of the state, and it follows of course that when such permission is given with reservations the company acting upon it is held within those reservations. Our statute gives such permission with the express reservation that the lessor "shall remain liable as if it operated the road itself."

Plaintiffs in error, however, assert that the Louisiana & Missouri River Railroad Company did have authority from the State to lease its road but that it did not receive such authority under or by virtue of said Sec. 3078, R. S. Mo. 1909; that said company received express authority from the State to lease its road under and by virtue of its amended charter, approved January 19, 1870, enacted prior to said Sec. 3078, R. S. 1909.

Section 43 of the railroad company's amended charter of 1870, provides that:

"It shall be lawful for said company, whenever the interests of said road or its branches may require it, to unite or consolidate the same, for running purposes, operation or business, with any railroad company, *upon such terms as may be mutually agreed upon* by the respective parties, * * * and may in like manner *lease* their said road, or any branch thereof, to any such railroad company for a period of years * * *" (Laws of Mo. 1870, p. 103) (Italics are ours).

Here is express authority from the State for this company to lease its road to any railroad company "upon such terms as may be mutually agreed upon by the respective parties," and without any condition or reservation that the lessor company should remain liable for any acts or conduct of the lessee company in the operation of the road.

This amended charter was duly and formally accepted by the Louisiana & Missouri River Railroad Company, and as quickly as practicable thereafter, and during the same year, said company did lease its said road to the Chicago & Alton Railroad Company and by the terms of that lease it was expressly provided that the lessee company alone should be liable for and should pay all damages for the acts and conduct of the lessee company, in the operation of the road (Printed Rec. p. 39, side page 64).

This amended charter was passed sixty four days before, and by its terms went into effect four days before the enactment of said Sec. 3078, R. S. Mo. 1909. Plaintiffs in error, therefore, assert that the Louisiana & Missouri River Railroad Company, having authority from the state to lease its road without remaining liable for the acts of its lessee in the operation of the road, under and by virtue of its said charter, is not liable to plaintiff (defendant in error here) in this case. Plaintiffs in error further assert and claim that said Louisiana & Missouri River Railroad Company does not derive its authority to lease said road from Sec. 3078, R. S. Mo., 1909 and, therefore, is not subject to the conditions and reservations of said statute; and further assert that inasmuch as said amended charter was in force and effect prior to the enactment of said Sec. 3078, to apply to said company the limitations and reservations upon its power to lease, contained in said Sec. 3078, would impair the obligations of its contract with the State, as embodied in its said charter.

The main federal question raised in this case, namely, that to apply the terms and conditions of Sec. 3078, R. S. Mo., 1909, to the La. & Mo. River R. Co. would impair the obligations of its contract (charter) with the state, is definite, clear cut and substantial.

III.

Counsel for defendant in error contend that Sec. 3078, R. S. Mo. 1909, should be deemed and construed as an amendment of the charter of the Louisiana & Missouri River Railroad Company. We contend that this construction cannot be given to said Sec. 3078 because the state had contracted with said company that its charter should not be altered or amended, at the mere discretion of the Legislature.

Sec. 36 of the original charter of the Louisiana & Missouri River Railroad Company, approved March 10th, 1859 (Laws of Missouri, 1859, p. 407) is as follows:

"This act and the company hereby incorporated, are exempt from the seventh * * * sections of the first article of the act concerning corporations, approved November 23rd, 1855."

Sec. 7 of article 1 of the Act of November 23rd, 1855, referred to in said section of the charter is as follows:

"Sec. 7. The charter of every corporation which shall hereafter be granted by the Legislature, shall be subject to alteration, suspension and repeal in the discretion of the Legislature" (R. S. Missouri, 1855, Chap. 34, Sec. 7, p. 371).

That was the only law of Missouri in force and effect at the time the charter of this company was granted which gave to the Legislature the power to amend corporate charters, at will. Therefore by exempting said corporation and its charter from the force and effect of said Section 7 of the Act of November 23, 1855, the state contracted with this corporation that the corporation and its charter should not be altered, amended or repealed in the discretion of the Legislature, that is, without the consent of the corporation. The original charter, that is, the original contract of this company with the state has never been altered or changed in this regard. On the contrary that clause of the contract is brought down into and reiterated in the amended charter of this company, enacted January 19th, 1870 (Laws of Mo. 1870, p. 101, Sec. 33).

It has not been questioned and, we presume, will not be questioned but that the State had the right to contract with this company, that its charter could not be amended at the will of the Legislature. It follows that inasmuch as the State had contracted with and guaranteed to this corporation that neither the company nor its charter could be altered, amended or repealed at the mere discretion of the Legislature, the State could not thereafter, either by legislative enactment or by constitutional provision impair that contractual right, by thereafter attempting to give or reserve to the Legislature the power to amend this charter, at will.

Houston & T. C. R. Co. v. *Texas,* 170 U. S. 243.
St. Tammany Water Works Co. v. *New Orleans W. W. Co.,* 120 U. S. 64.
Trustees of Dartmouth College v. *Woodward,* 4 Wheat. (U. S.) 56.
U. S. v. *Central Pac. Ry.,* 118 U. S. 237.
State ex rel. v. *Greer,* 78 Mo. 188.
State ex rel. v. *Board of Trustees,* 175 Mo. 52.

But, says counsel for defendant in error, the right and authority of the Louisiana & Missouri River Railroad Company to lease its road without remaining liable for the acts of its lessee, was not granted to that company in its original charter, but was granted to the company, for the first time, in its amended charter of 1870, by Sec. 43 thereof, and that in the meantime, the Constitution of Missouri of 1865 had been adopted and that Sec. 4 of article 8 of the Constitution of 1865 provides:

"Corporations may be formed under the general laws, but shall not be created by special acts, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered, amended or repealed."

There are a number of reasons why Sec. 3078, R. C. Mo. 1909, cannot be upheld as an amendment to the La. & Mo. River R. Company's charter, under and by virtue of said section of the Constitution of 1865.

1. It was a part of the State's original contract with this corporation that it should not be altered or impaired, without its consent. That much of its original contract with the state has never been altered or abridged. As before stated the same proviso is found in Sec. 33 of the amended charter of 1870. Note how strong is the language of Sec. 36 of the original charter (Laws of Mo. 1859, p. 407):

"This act, *and the company hereby incorporated,* are exempt" from alteration, amendment or repeal in the discretion of the Legislature.

Not only the original *charter* of the corporation, but the *company itself* is exempt from any such right of the Legislature. No other sensible construction can be given to Sec. 36 of this company's original charter than that not only the original act of incorporation, but any future amendment thereto should be exempt from the right of the Legislature to amend same at its discretion. The State having so contracted with this company, it was powerless, even by constitutional provision, to alter or impair the obligation of that contract.

The case of *State ex rel.* v. *Greer,* 78 Mo. 188, deals expressly with the proposition that a State is powerless to alter or impair the obligation of a contract by a constitutional provision. In the opinion in that case, the court say:

"The constitutional convention, as we have seen, has no more power to violate vested rights than the legislature, and no general assembly succeeding that which granted this charter, could have interfered with the mode of voting the stock, which, it is contended, the constitution did. This corporation was expressly exempted from the operation of the general law of 1845, which authorized the legislature to alter, suspend or repeal the charter of every corporation thereafter granted by the legislature."

2. The Constitution of Missouri, 1865, and particularly, Sec. 4 of Article 8, above quoted, by its terms does not apply to and has no bearing upon the amended charter of 1870, of the Louisiana & Missouri River Railroad Company. It will be noted that said section prohibits the Legislature from *creating* corporations by *special* acts, except for municipal purposes. The act of 1870, amending the charter of the Louisiana & Missouri River Railroad Company was a special act, and if that act were held to have been passed "pursuant to" said section of the Constitution of 1865, it would have been void. That the said amended charter of 1870 was not passed "pursuant to" the Constitution of 1865, and that said Constitution has no applicability to said amended charter has been thoroughly established by decisions of the Supreme Court of this State. The leading case in this state on this proposition is that of *State ex rel. Attorney General* v. *Cape Girardeau & State Line R. R.,* 48 Mo. 468. The railroad company involved in that case was

incorporated in the same year as the Louisiana & Missouri River Railroad Company, 1859. After the adoption of the Constitution of 1865, that is in 1869, a special act was passed by the Legislature, amending the charter of that railroad. Thereafter, a proceeding in the nature of a *quo warranto* was brought by the Attorney General of the State of Missouri, questioning the validity of the amended charter by reason of the above quoted section of the Constitution of 1865. In the opinion in that case the court say:

"The only question presented by the record is whether the act of February 18, 1869, amendatory of the act of incorporation of the company, is unconstitutional and void, as being of a class of special legislation which the constitution prohibits the Legislature from enacting. * * * We know that the Legislature of this state has proceeded upon the theory that the prohibitory clause in the constitution did not extend to amendments to laws in force prior to its adoption. The section in the State Constitution inhibiting the passage of special laws, designates and enumerates certain specific acts on which a complete prohibition is placed, and then concludes as follows: 'The general assembly shall pass no special law for any case for which provision can be made by a general law, but shall pass general laws providing, so far as it may deem necessary, for the cases enumerated in this section, and for all other cases where a general law can be made applicable.' (Const. 1865, Art. IV, Sec. 27.) Whether a general law could be made applicable, and answer the purpose of amending these charters, is perhaps a question of not very easy solution. Be that as it may, the clause was obviously intended to have a prospective operation, and apply only to laws passed after the adoption of the constitution. Those who advocate the stringent interpretation that a prior law cannot be amended by a special act, seem to have overlooked a very important provision of the State Constitution. In Article XI, Section 3, it is declared that 'all statute laws of this state now in force, not inconsistent with this constitution, shall continue in force until they shall expire by their own limitation, or be amended or repealed by the general assembly.' In this section the constitution makes express provision and clearly delegates the power of the Legislature to amend all laws in force prior to the time the constitution went into operation. As this charter was granted previous to that time, I think it was properly subject to amendment by the Legislature."

The above case has never been overruled, questioned or criticised. It was directly reaffirmed in the case of *State ex rel.* v. *Thileneus,* 48 Mo. 479, and in the case of *St. Joseph, etc. Railway Company* v. *Shambaugh,* 106 Mo. l. c. 569. It has been cited with

approval in many and more recent cases in the Supreme Court of Missouri. It has also been cited with approval by this court in the case of *Keokuk & W. R. R. Co.* v. *State of Missouri,* 152 U. S. l. c. 305, and in the case of *County of Callaway* v. *Foster,* 93 U. S. 570. In the last case cited, there was involved the validity of the very amended charter of the Louisiana & Missouri River Railroad Company, here in question. In the opinion in that case, after referring to said section 4 of article 8 of the State Constitution of 1865, the court say:

"The Constitution of 1865 contains in connection with the provision already quoted, the following: 'All statute laws of the state now in force, not inconsistent with the Constitution, shall continue in force until they shall expire by their own limitations, or be amended or repealed by the General Assembly.' In *Mo.* v. *R. R. Co.,* 48 Mo. 468, it was held, that the constitutional provision prohibiting special amendments did not extend to amendments of laws in force when it was adopted, but that additional power given to the Cape Girardeau Railroad, by the means of an amendment to its charter, was a lawful exercise of authority. The cases before cited show that the Act we are considering is not inconsistent with the Constitution, as it continued in force after its adoption as before. It is difficult to discover any principle which can distinguish an amendment to the charter of the Louisiana & Missouri River Railroad Company, altering its terms and conditions within its original limits, and of the general nature and scope of its original charter, from the Cape Girardeau (*Mo.* v. *R. R. Co.*) case."

The law as established in the above decisions has become a rule of property in this state. Based thereon numerous special acts have been passed by the Legislature, amending charters of corporations that existed prior to the Constitution of 1865, and numerous property rights have vested thereunder, including the amended charter of the Louisiana & Missouri River Railroad Company, and its lease to the Chicago & Alton Railroad Company, in accordance with the power therein granted.

The only provision of the Constitution of 1865, reserving in the Legislature the power to amend at will corporate charters is found in said Sec. 4, article 8, as follows:

"Acts passed *pursuant to* this section may be altered, amended or repealed."

The decisions above cited settle the question that the amended charter of 1870 of the Louisiana & Missouri River Railroad Com-

pany, here in question, was *not* an act "passed pursuant to this section" of the Constitution of 1865. Rather, being a special act, it was passed notwithstanding or in spite of said section of the Constitution. It is, therefore, not amendable, at the mere will of the Legislature, by virtue of the Constitution of 1865. It follows that said Sec. 3078, R. S. Mo. 1909, may not be upheld as a valid amendment of the charter of said Railroad Company of 1870, under and by virtue of said section of the Constitution of 1865.

3. If it were held that the Constitution of 1865 was applicable to the amended charter of the Louisiana & Missouri River Railroad Company of 1870, this would be ineffective to uphold Sec. 3078, R. S. Mo. 1909, as a valid amendment of said company's charter, for two reasons:

(a) The Constitution of 1865 does not prohibit the Legislature from placing reasonable conditions or restrictions upon itself in amending corporate charters. Accordingly, the Legislature adopted the following condition or requirement with reference to the amendment of corporate charters:

"No charter of any corporation, granted by the Legislature of this State, shall be altered, suspended or repealed by such Legislature, unless proof be made satisfactorily to the Legislature that notice of such proposed alteration, suspension or repeal has been given to the President and Secretary of such corporation, for at least one month before the time at which such alteration, suspension or repeal will be proposed." (R. S. Mo. 1865, Chap. 62, p. 330, Sec. 21.)

No pretense is or can be made that any notice was given to the Louisiana & Missouri River Railroad Company or its officers that it was proposed to pass said section 3078, as an amendment to its charter.

(b) If Section 3078 R. S. 1909, is an amendment of said Railroad Company's charter it is such only by implication. But since the adoption of the Constitution of 1865 (Sec. 25, Art. 4), which provides that "the act or part of act amended, shall be set forth and published at length, as if it were an original act or provision." It has not been possible to amend a legislative act by implication.

State ex inf. v. *Trust Co.*, 144 Mo. l. c. 595.

IV.

Learned counsel for defendant in error contend that the constitutional question involved here was decided by this court in the case of *Chicago & Alton R. R. Co.* v. *Tranbarger,* 238 U. S. 67. This is by no means correct. The Louisiana & Missouri Railroad Company was not a party to that case and its charter was not directly involved therein. The sole proposition decided in the Tranbarger case was that an act of Missouri requiring railroad companies to put ditches and drains through and across their roadbeds and rights of way was sustainable as a police regulation, "reasonably necessary to secure the health, safety or general welfare of the company." Assuredly no contention will or can be made that the part of Sec. 3078, R. S. Mo. 1909, in question here, is sustainable as a police regulation.

V.

There is another constitutional or federal question that is squarely raised upon the record in this case, namely that the State trial court had no jurisdiction to try this case by reason of the fact that the same was duly removed to the Federal Court by defendant, the Chicago & Alton Railroad Company. The record herein shows that in due time the Chicago & Alton Railroad Company filed herein its petition and bond for removal to the Federal Court (Printed Rec. pp. 33-35); that the bond was approved by the court but the petition for removal denied and the case ordered to proceed to trial in the State Court. Plaintiff in error duly excepted to such ruling of the court and to act of the State Court in continuing to assume jurisdiction over the case (Printed Rec. p. 36). The petition for removal set forth the facts showing that plaintiff did not and could not have any case against the defendant Louisiana & Missouri River Railroad Company, by reason of its charter rights to lease its road to the Chicago & Alton Railroad Company, without itself remaining liable for the acts of the latter in the operation of the road, and further showed that the sole controversy in this case was between plaintiff (defendant in error here) and the Chicago & Alton Railroad Company, and that as the proper diversity of citizenship existed, said cause was removable to the Federal Court. This Federal question was decided adversely to plaintiffs in error in the Supreme Court of Missouri and is duly presented to this court by assignment of error No. 7 herein (Printed Rec. p. 12, side p. 17).

We respectfully submit that the motion of defendant in error to dismiss the writ of error or to affirm the judgment herein should be denied.

WILLIAM C. SCARRITT,
ELLIOTT H. JONES,
CHARLES M. MILLER,
Attorneys for Plaintiffs in Error.

No. 714.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

THE CHICAGO & ALTON RAILROAD COMPANY, ET AL., PLAINTIFFS IN ERROR,

VS.

WILLIAM J. McWHIRT, DEFENDANT IN ERROR.

PETITION FOR LEAVE TO FILE ADDITIONAL SUGGESTION ON BEHALF OF PLAINTIFFS IN ERROR.

Now come plaintiffs in error, The Chicago & Alton Railroad Company and Louisiana and Missouri River Railroad Company, and beg leave of court to file the additional suggestion on behalf of plaintiffs in error, which accompanies this petition, for the reason that it is believed by counsel for plaintiffs in error that a statute of Missouri, to which attention is called, has a vital bearing on the chief issue in this case, and because it is believed that the suggestion herein contained will be of much service to the court in the determination of this cause.

Respectfully submitted,

Wm. C. Scarritt
E. Elliott H. Jones
Chas. M. Miller
Attorneys for Plaintiffs in Error.

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WILLIAM J. McWHIRT, DEFENDANT IN ERROR.

ADDITIONAL SUGGESTION ON BEHALF OF PLAINTIFFS IN ERROR.

In the brief of counsel for defendant in error herein, on page 8, there is set out a statute of Missouri which is cited as section 47 of chapter 63 of the General Laws of 1865, and which provides as follows:

"Section 47. The legislature may, at any time, alter or amend this chapter, but such amendment shall not impair the rights of companies previously organized. * * *"

It has just been called to the attention of counsel for plaintiffs in error herein that this statute vitally bears upon the question at issue in this case, and in a manner not heretofore called to the attention of the court. Note that section 47 of chapter 63 of the General Laws of 1865, above quoted, empowers the legislature to amend said chapter 63 at any time, but provides, expressly, that "such amendment shall not impair the rights of companies previously organized."

Now Section 3078, R. S. Mo. 1909, under which it is sought to hold the Louisiana & Missouri River Railroad Company liable in this case was an amendment to said Chapter 63 of the General Statutes of 1865, and was enacted as such. Said Section 3078, R. S. Mo. 1909 is first found in the Laws of Missouri of 1870 at page 89, and the title thereof is as follows: "An Act to amend Chapter

63 of the General Statutes, entitled 'Of Railroad Companies' so as to authorize the consolidation, leasing and extension of railroads." It follows that this Act of March 24th, 1870 (Sec. 3078, R. S. Mo. 1909), must be read in direct connection with and is subject to Section 47 of said Chapter 63. As before stated, said Section 47 expressly provides that any amendment to said chapter "shall not impair the rights of companies previously organized."

Now, plaintiff in error, Louisiana & Missouri River Railroad Company, was a company organized previous to the enactment of the amendment of 1870 (Sec. 3078, R. S. Mo. 1909) to said Chapter 63 of the General Laws, said railroad company having been originally created in 1859, and having received an amended charter by an Act of the Legislature of January 19th, 1870, and by Section 43 of its amended charter of 1870 (Laws of Missouri, 1870, page 102) this company is expressly empowered to lease its railroad to any other company without any condition or restriction that it shall remain liable for the acts of its lessee company in the operation of the railroad. And upon so leasing its road, under its charter power, the lessor did not continue liable for the acts of its lessee in operating the road. *Moorshead* v. *Rys.* 203 Mo. 121.

This right to lease its railroad, without remaining liable for the acts of its lessee, was, therefore, one that the Louisiana & Missouri River Railroad Company had prior to the enactment of the Act of March 24th, 1870 (Sec. 3078, R. S. Mo. 1909) and as said Act of March 24th, 1870, which undertakes to provide that if a railroad corporation of this state leases its road to a corporation of another state it shall remain liable as if it operated the road itself, is an amendment to Chapter 63 of the General Laws of 1865, and must be read in connection with Section 47, above quoted, of said Chapter 63, we find an express provision in the statute law of Missouri, to the effect that the Act of March 24th, 1870 (Sec. 3078, R. S. Mo. 1909) "shall not impair the rights of companies previously organized," that is, shall not impair the right of the Louisiana & Missouri River Railroad Company to lease its railroad to any other company without remaining liable for the acts of its lessee.

Respectfully submitted,

WILLIAM C. SCARRITT,
ELLIOTT H. JONES,
CHARLES M. MILLER,
Attorneys for Plaintiffs in Error.

CHICAGO & ALTON RAILROAD COMPANY ET AL. *v.* McWHIRT.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 714. Argued January 29, 30, 1917.—Decided March 26, 1917.

A provision in the special charter of a railroad company permitting the grantee to lease its road to any other railroad company "upon such terms as may be mutually agreed upon" is not to be construed as authority for the lessor and lessee to determine what shall be their respective liabilities to third persons who may be tortiously injured in the operation of the road when leased; therefore it creates no contract right which would be impaired by subsequent general legislation rendering the lessor and lessee jointly liable for such torts when committed by the latter, and this quite apart from any power of the legislature to alter or amend the charter.

A state law rendering any railroad company of the State leasing its road to a company of another State liable jointly with the lessee for actionable torts of the latter committed in the operation of the road, does not deprive of due process or deny the equal protection of the laws.

When the plaintiff pleads a case of joint liability under the state law against a resident and a nonresident defendant, the case is not removable from the state to the federal court in the absence of any showing that the defendants were joined fraudulently for the purpose of preventing removal.

187 S. W. Rep. 830, affirmed.

THE case is stated in the opinion.

Mr. Elliott H. Jones, with whom *Mr. William C. Scarritt*, *Mr. Charles M. Miller*, *Mr. Alfred M. Seddon*, *Mr. Edward S. North* and *Mr. E. L. Scarritt* were on the briefs, for plaintiffs in error.

Mr. Patrick Henry Cullen, with whom *Mr. Thomas T. Fauntleroy* and *Mr. Charles M. Hay* were on the brief, for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was an action to recover for personal injuries caused, as was alleged, by negligently backing an engine and cars across a public street in Vandalia, Missouri, without taking any precautions for the safety of persons using the street at the time. The action was against two railroad companies, one incorporated in Missouri and the other in Illinois. The former had constructed and still owned the railroad and the latter was operating it under a lease. A trial resulted in a judgment for the plaintiff, and this was affirmed. 187 S. W. Rep. 830.

The Missouri company was created by a special act in 1859, Laws 1859, p. 400, which was amended, with the company's consent, by special acts in 1868 and 1870, Laws 1868, p. 97; Laws 1870, p. 93. A general and older statute provided that all subsequent corporate charters should be "subject to alteration, suspension and repeal, in the discretion of the Legislature," Rev. Stats. 1855, p. 371, § 7; but these special acts declared that this provision should have no application to them or to the Missouri company. After the Act of 1859 and before it was amended the State adopted a new constitution containing a provision that corporations, other than for municipal purposes, could be formed only under general laws and that these might be altered, amended or repealed; but under the local decisions it is doubtful at least that this provision was applicable to subsequent amendments of charters previously granted, *State ex rel. Circuit Attorney &c.* v. *Cape Girardeau & State Line R. R.*, 48 Missouri, 468; *St. Joseph & Iowa R. R. Co.* v. *Shambaugh*, 106 Missouri, 557, 569; *County of Callaway* v. *Foster*, 93 U. S. 567, 570, and so it may be put out of view. The amendment of 1870, which took effect on March 20th of that year, authorized the Missouri company to lease its road

for a period of years to any other railroad company "upon such terms as may be mutually agreed upon." March 24 of the same year a general statute was enacted which, as locally interpreted, renders any railroad company of that State leasing its road to a company of another State liable jointly with the lessee for any actionable tort of the latter committed in the operation of the road. Laws 1870, p. 91, § 2; *Brown* v. *Louisiana & Missouri River R. R. Co.*, 256 Missouri, 522, 534. Following this enactment the Missouri company leased its road to the Illinois company, and it was under this lease that the latter was operating the road when the plaintiff was injured. In the lease the lessee agreed to pay off and satisfy all lawful claims for damages arising out of its negligence or dereliction of duty while operating the road.

The general statute of March 24, 1870, now embodied in Rev. Stats. 1909, § 3078, was applied in this case over the Missouri company's objection that it could not be so applied without bringing it in conflict with the contract clause of the Constitution of the United States and with the due process and equal protection clauses in the Fourteenth Amendment. The overruling of this objection and the denial of a petition for removal to the federal court are the matters to be reviewed here.

In invoking the contract clause the Missouri company goes upon the theory that the special acts constituting its corporate charter broadly authorized it to lease its road to any other railroad company upon any terms which might be agreeable to both and that, in the absence of a reservation of power to alter, amend or repeal the charter, a later statute qualifying the authority to lease or attaching any condition to its exercise—as by making the company liable for the torts of the lessee committed in conducting the road—necessarily impairs the obligation of the charter contract. While not doubting that any lawful contract contained in the charter is within the pro-

tection of the clause invoked, *Stone* v. *Mississippi*, 101 U. S. 814, 816–817, we find nothing in the charter respecting the liability of the Missouri company for torts committed by another company to which it commits the operation of its road under a lease. That subject is not dealt with in the charter in any way. The provision that the leasing may be upon such terms as are mutually agreeable to the parties is not in point, for it obviously relates to matters which appropriately can be left to the lessor and lessee, such as their rights and duties as between themselves, and not to matters of public concern, such as the rights of third persons to recover for injuries sustained through the negligent operation of the road under the lease. As to the latter we think it is plain that no contract was intended or made by the State and that the matter remained open to legislative action when the provision in the Act of March 24, 1870, was adopted. *Texas & New Orleans R. R. Co.* v. *Miller*, 221 U. S. 408; *St. Louis & San Francisco Ry. Co.* v. *Mathews*, 165 U. S. 1; *Chicago & Alton R. R. Co.* v. *Tranbarger*, 238 U. S. 67, 76.

That provision was in force when the lease was made. It is not inherently arbitrary, is found in the laws of other States, and applies to all railroad companies of Missouri which lease their roads to companies of other States. In these circumstances it neither deprives the Missouri company of its property without due process of law nor denies to it the equal protection of the laws.

The plaintiff was a citizen of Missouri and, as before stated, one of the defendants was an Illinois corporation. The latter sought to remove the case against it into the federal court upon the ground that the same involved a distinct and separable controversy between citizens of different States. But the petition for removal was denied, and rightly so. Under the local law the case stated in the plaintiff's pleading was one of joint liability on the part of the defendants and, for the purpose of passing upon the

petition for removal, this was decisive of the nature of the controversy, there being no showing that the defendants were fraudulently joined for the purpose of preventing a removal. *Alabama Great Southern Ry. Co.* v. *Thompson*, 200 U. S. 206, 213, *et seq.*; *Chesapeake & Ohio Ry. Co.* v. *Cockrell*, 232 U. S. 146, 152.

Judgment affirmed.